CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 225

BAKERY SALES DRIVERS LOCAL UNION No. 33, AN UNINCORPORATED ASSOCIATION, ET AL., PETITIONERS,

vs.

A. WAGSHAL, TRADING AS "WAGSHAL'S DELICATESSEN"

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED JULY 24, 1947.

CERTIORARI GRANTED OCTOBER 13, 1947.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No.

BAKERY SALES DRIVERS LOCAL UNION No. 33, AN UNINCORPORATED ASSOCIATION, AND CHARLES M. ANDRE, PETITIONERS,

vs.

A. WAGSHAL, TRADING AS "WAGSHAL'S DELICATESSEN"

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

INDEX

	Original	Print
Record from D. C. U. S., District of Columbia	1	1
Complaint for injunction and damages	1	1
Motion for injunction	5	5
Motion to dismiss	6	5
Answer to motion to dismiss	8	7
Affidavit of Benjamin Wagshal	9	8
Judgment for injunction pendente lite	16	13
Order denying motion to dismiss	18	15
Notice of appeal	19	15
Proceedings in U. S. Court of Appeals for the District of Columbia	21	16
Motion to dismiss appeal	21	16
Order for argument	24	18
Opinion, Clark, J.	25	19
Dissenting opinion, Edgerton, J.	30	26
Order of dismissal	32	29
Designation of record	33	29
Clerk's certificate (omitted in printing)	35	
Order allowing certiorari	36	30

[fol. 1] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

A. WAGSHAL, Trading as, "Wagshal's Delicattessen", 4855 Massachusetts Av., N. W., Plaintiff,

vs.

BAKERY SALES DRIVERS LOCAL UNION No. 33 and Unincorporated Association, and Charles M. Andre, Individually, and as President and Associate Business Agent of Said Union, Defendants

COMPLAINT FOR INJUNCTION AND DAMAGES—Filed August 18, 1945

The complaint of the plaintiff respectfully represents:

1. That she is a citizen of the United States and a resident of the District of Columbia and has been such for many years; that she now is and for many years has been, the owner of the business above named; that said business, conducted through her manager and employees in a store at 4855 Massachusetts Avenue, Northwest, in the District of Columbia, consists of dealing in and supplying at retail, hundreds of various kinds of plain and fancy foods and delicacies for human consumption, most of which are prepared, packed and canned by various manufacturers located in the several States in the United States and abroad. Food is also prepared and served in said store of plaintiff to many patrons, many of whom are in the Naval and Military services of the United States; that among other kinds of said foods, plaintiff sells and serves large quantities of bread, rolls, pastries, and other bakery products, the same which are absolutely essential to the conduct of plaintiff's said business.

2. To offer larger and better facilities to the public, plaintiff has, shortly prior to the matters, hereinafter set forth occur-ing, expended about $10,000, for modernized equipment and alterations. Plaintiff's sale of said merchandise and serving of food aforesaid, totals about $100,000, per annum.

[fol. 2] 3. The defendant number one is an un-incorporated association, commonly called a "labor union" composed of many members who are mostly bakery drivers. About 2 months prior to to wit, July 5, 1945, one of said member drivers of said defendant union, started to deliver bakery products for Hinkle's bakery, which plaintiff has dealt with for several years. Due to the repeated deliveries of said bakery products to plaintiff during the busy noon hour, he was on to wit, the day aforesaid, *required* to bring said products, bread, etc., back at a later hour. Shortly thereafter, the said Hinkle bakery, informed plaintiff that the said driver would make no more deliveries to plaintiff and therefore the bakery could make and furnish plaintiff with no bakery products. Plaintiff did immediately thereupon arrange with another bakery to secure its bakery products, the same which were delivered to the plaintiff.

4. On to wit, July 26, 1945, one Charles M. Andre, the other defendant herein, came in plaintiff's said place of business, and after stating that he was the agent of defendant union, and that a certain sum, about $150.00 was owing to the driver by plaintiff, and that it had to be paid immediately. The plaintiff informed the said agent that no dealings were had with the driver of Hinkle's bakery, that the account had always been with the bakery, and that payment was at all time made direct to the bakery by check, and never to the driver; that whatever was due Hinkle's bakery would be paid in the regular course and upon adjustment made. Defendant Andre stated he was not concerned in any adjustments or account, that payment would have to be made to the driver in full, and further, that unless plaintiff immediately discarded and discontinued carrying for sale a certain non union made item, of the many hundreds of foods, carried by plaintiff aforesaid, his union would stop and prevent any more bread and bakery products, also all dairy products, also all shipments from outside of the District of Columbia made by Railway Express Co., from being delivered to the plaintiff; that his union was formed and maintained to enforce its demands and were able to do so. Shortly thereafter payment of the balance due by plaintiff to Hinkle's bakery was made direct to said bakery minus certain credits, said payment was thereafter returned by defendant union, with a letter signed by defendant Andre as president, setting forth that the

payment, "which is owed to our member, Leon Wolfe, cannot be accepted.

[fol. 3] 5. On the following day, July 27, 1945, The New Philadelphia bakery, which had been delivering its products to plaintiff informed her that no more deliveries could be made; that the defendant union had advised them that if any more bakery — was sold or delivered to plaintiff, it would "pull out all its drivers". Plaintiff did thereafter attempt to secure bread etc., from other bakeries, but defendants, well knowing that plaintiff's continuation in business was largely based upon its being able to sell and to serve bread, and other bakery products, and conspiring and contriving to injure and to destroy plaintiff's said business, caused, by means of threats and intimidations of destroying the business of the several bakeries, the said various bakeries were thus caused to breach their contracts of sale of bread, etc., made with the plaintiff. Plaintiff has by the means aforesaid been boycotted, as was threatened to by said defendants, with all bakeries in said District, resulting in plaintiff being unable even to call at the premises of the bakeries and thereby obtain said bread, etc., for cash. Defendants have also threatened to prohibit in like manner all deliveries and sales of milk and dairy products to be made to the plaintiff, which if not enjoined, will compell plaintiff to discontinue business, to her irrep-rable damage. Plaintiff through her agents have attempted to secure bread at retail from other retail stores, but this method, too, defendants are preventing by having threatened a certain grocery store to cut of- their supply of breads, etc., if as much as one loaf of bread was sold to said plaintiff's agent. Defendants have fals-ly and maliciously stated of plaintiff, in furtherance of its boycott of plaintiff and practice of extortion and cohercion, to several of said bakeries, as reason why they must not furnish its products to plaintiff, "that plaintiff was involved in a labor dispute, the same which is false and known to be false by the defendants.

6. Plaintiff had prior to the happenings herein set forth, had and enjoyed a good reputation for honesty and fair dealing, and thereby had a good credit standing among the trade; that defendants, well knowing the same, and maliciously intending and conspiring to injure plaintiff in her good credit standing aforesaid, the same which is valuable to her business, the defendant, Charles M. Andre indi-

vidually and as agent for defendant union, stated and published the false and malicious statement, that plaintiff owed money to one of its member drivers and would not pay him. [fol. 4] All of which has caused plaintiff great damage in her business and in suffering great nervous shock and mental anguish.

7. Defendant Andre did personally stand outside of plaintiff's place of business for two days and picketed the plaintiff.

8. That said picketing and boycotting is continuing by defendants which is seriously affecting plaintiff's business, she is unable to get the kind or quantity of breadstuffs needed, and if defendants carry out their threat to prevent plaintiff from securing dairy products, she will be compelled to discontinue business.

Wherefore, the premises considered, complainant prays:

1. That defendants be restrained, pendente-lite and permanently from boycotting and in any manner interfering with plaintiff's business and cease all and all acts herein set forth tending to prevent plaintiff from securing any merchandise from any and all dealers or manufacturers.

2. That defendants and each of them and their members, associates who-soever, be restrained and enjoined from uttering or in any manner publishing and false and slanderous statements about the plaintiff and in the conduct of her business, and of any of her employees or associates.

3. That defendants be required to pay plaintiff the sum of $50,000 as actual damages and the further sum of $50,000 as punitive damages.

4. And for any other relief to which the plaintiff may be entitled.

Philip Wagshal, Attorney for Plaintiff.

Philip Wagshal, Attorney for Plaintiff, Bond Building, District 3035.

[fol. 5] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

MOTION FOR INJUNCTION—Filed August 20, 1945

Comes now the plaintiff through her attorney, and respectfully moves this Honorable Court to issue an injunction against defendants, restraining them, and each of them, their members and associates, agents or servants, from conspiring, agreeing or combining in any manner to restrain, obstruct or destroy the business of the complainant, and from threatening or intimidating, or to take any action whatever injurious to any persons or firms whomsoever in the attempt to prevent them from delivering, selling or serving plaintiff their products; Ane for reasons therefore respectfully says:

1. That defendants have no legal and justifiable cause or reason for their malicious acts of slander, threats, boycott and picketing and other wrongful and illegal acts, committed against plaintiff.

2. That unless defendants are so injoined and restrained, plaintiff will suffer irrepapable damage, including the total loss of her business which is valuable and has been established for many years, and which has been and yet is considered essential.

Philip Wagshal, Attorney for plaintiff.

Philip Wagshal, Attorney for Plaintiff, Bond Building.

[fol. 6] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

MOTION TO DISMISS—Filed August 22, 1945

The defendants above named, by the undersigned, their attorney, move the Court to dismiss the above entitled action because the complaint fails to state a claim against

defendants upon which relief can be granted. Defendants state the following grounds for such motion:

1. The complaint in its substance attempts to state a cause of action in equity requiring injunctive relief. The complaint and the allegations therein contained disclose that the claim of the plaintiff is founded on a labor dispute as defined in the Norris-LaGuardia Act (Sections 104, 107 and 113, Chapter 6, Title 29, U. S. C. A.), and that the Court is without jurisdiction to grant the relief prayed for both as to the prayer for injunction and for damages.

2. The controversy set forth in the complaint involves a labor dispute as defined in the Norris-LaGuardia Act. Accordingly, it is incumbent upon plaintiff to disclose by affirmative allegations that he was entitled to invoke the equitable jurisdiction of this Court as limited by such Act. This he has failed to do. Accordingly, the Court has no jurisdiction over the subject matter of the action and no [fol. 7] jurisdiction to grant relief in equity or in law.

3. The complaint on its face wholly fails to state the existence of any action, activity or conspiracy which is illegal, unlawful or contrary to the laws of the District of Columbia or of the United States or which entitles plaintiff to any injunctive relief or to any damages.

Joseph A. Padway, 736 Bowen Building, Washington 5, D. C., Attorney for Defendants.

Copy received and service acknowledged this 22nd day of August, 1945.

Philip Wagshal, Attorney for Plaintiff.

[fol. 8] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

ANSWER TO MOTION TO DISMISS FILED BY DEFENDANT—Filed September 4, 1945

Now comes the plaintiff and for answer to the Motion to Dismiss filed by the defendant herein says:

1. The Complaint in substance states a cause of action requiring injunctive relief in equity. Said Complaint further discloses upon its face that there is no labor dispute as defined in the Norris-LaGuardia Act and that this Court has complete jurisdiction to grant the relief prayed for both as to the prayer for injunction and for damages;

2. Attached hereto and made part of this Answer are affidavits filed in accordance with the suggestion of said Motion to Dismiss. These affidavits further disclose upon their face that there is and can be no labor dispute existing in this case within the definition in the Norris-LaGuardia Act aforesaid;

3. For authorities in support of this her reply, plaintiff refers to the identical authorities cited by the defendant in support of its Motion to Dismiss and further to the general jurisdiction conferred upon this Court to grant injunctive relief in appropriate cases.

Philip Wagshal, Bond Building; William E. Leahy, 821-15th St. N. W.; Nicholas J. Chase, 821-15th St., Attorneys for Plaintiff.

[fol. 9] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

C. A. #30-226

A. WAGSHAL, et al., Plaintiff,

vs.

BAKER SALES DRIVERS LOCAL UNION #33, et al., Defendants

AFFIDAVIT OF BENJAMIN WAGSHAL

CITY OF WASHINGTON,
District of Columbia, ss:

Benjamin Wagshal being first duly sworn deposes and says that he is the manager of A. Wagshal, trading as Wagshal's Delicatessen, and has been for approximately nine years; that the said business has been operated in its present location for approximately seven years; that it conducts a general delicatessen business and a restaurant; that as such it carries in stock thousands of different items of merchandise and serves meals to many people each day as in the petition filed in this cause duly sets forth; that in the conduct of said business no deliveries of merchandise are made to purchasers, all purchases of merchandise being made in the store and being carried therefrom by the purchaser thereof; that no meals are delivered and all foods served for meals is served and eaten in the restaurant connected with said business aforesaid; that in the conduct of said business bread is an essential and most important item; that among the various bakeries from which the plaintiff has been purchasing bread is the bakery identified as Hinkle's Bakery, with which the plaintiff has been dealing for approximately three years; that the occasion for the action of the defendant union was in the payment for bread purchased from the said bakery; that throughout the [fol. 10] period of time the plaintiff has been purchasing bread from the owners of said bakery the plaintiff has been buying said bread directly from said bakery and been paying therefor by check made payable to the owners of said bakery; that no question was ever raised by the defendant union or any of its drivers at any time in regard to the payment being made to the said owners of said bakery; that no demand for payment was ever made by the said defend-

ant union or any driver thereof for payment for any bread bought from the said bakery to said union or any driver thereof before the occasion set forth in said petition aforesaid; that the plaintiff never had any contractual relations with the defendant union or any of its drivers; that its contract obligations were incurred with the owner of the bakery and with no one else; that this was well known to the defendant union and to the drivers who delivered bread from said bakery to the plaintiff; that this course of conduct as between said plaintiff and the owners of said bakery had, as hereinbefore stated, existed over the entire period during which the plaintiff was buying bread from said bakery; that the particular driver of the defendant union who, affiant is informed, is named Wolf, was advised by plaintiff that deliveries of bread from this bakery at the time he was delivering same were extremely inconvenient to the plaintiff and were occur-ing at a time when the restaurant business required his full attention and made it practically impossible for him to check and again properly accept deliveries and was asked for that reason to deliver said bread at some other hour when the same could be properly checked and received; that said driver then refused to deliver bread at all from said bakery to your plaintiff; that at this time plaintiff was indebted to the owners of said bakery for bread already delivered and in accordance with the said practice which had existed over the entire period of time during which plaintiff had been [fol. 11] buying bread from this bakery made his check payable to the owners of said bakery in the amount which he considered to be in full for all indebtedness then existing; that thereafter a representative of the defendant union who identified himself by the name of Andre came to plaintiff's place of business and stated that the plaintiff owed the driver of the defendant union for bread delivered in a sum greater by the amount of approximately $12.00 than that which plaintiff had paid through said check aforesaid; that thereafter, by letter dated August 8, 1945, the plaintiff received from the defendant union, on its letterhead, the return of his check "because it is $12.22 short of the amount which is owed to our member, Leon Wolf." Said letter further stated "there are two things we deeply regret. The first is, you failed to realize that the entire sum of money involved is owed to Mr. Leon Wolf, a member of this organization, and not to the Hinkle Bakery." Said letter

was signed by the union through Charles M. Andre, President. Your affiant states that plaintiff never bought any bread from Mr. Leon Wolf as hereinbefore set forth; that he never owed Mr. Leon Wolf any sum whatsoever for any cause and that his purchases of bread were always made directly with the owners of the Hinkle Bakery and paid directly to said bakery as hereinabove set forth. Furthermore, your affiant says that all orders for bread from the Hinkle Bakery were made by telephone to the Hinkle Bakery directly and that neither Mr. Leon Wolf nor any other driver of the defendant union had ever even accepted an order from plaintiff for bread for delivery on the ensuing day; that this direct practice of ordering and paying for bread from and to the Hinkle Bakery was well known to said Wolf and the defendant union aforesaid; that the said Andre aforesaid had called plaintiff on the telephone and advised plaintiff that said check would not be accepted as payment in full and accordingly it was returned; that [fol. 12] before writing the letter hereinbefore mentioned the said Andre had called at plaintiff's place of business and advised him, the said plaintiff, that he, said plaintiff, owed Wolf payment for the bread hereinbefore mentioned; that he was not interested in any difference as to the amount thereof; that the full amount must be paid as claimed by said Andre, and at that time pointed to a few packages of rolls which were then in the plaintiff's place of business and advised plaintiff that he must get rid of them; that these rolls constituted but an extremely small item of plaintiff's merchandise and in comparison with the total amount purchased and sold by plaintiff constituted an insignificant item and your affiant avers that as to this statement with regard to these rolls, Andre was making of them but an occasion for enforcing the payment of an amount due to the owners of the Hinkle Bakery and in the amount which he, Andre, contended was owing and not to Wolf, the driver and member of the defendant Union to whom Plaintiff says he never owed a cent and never had any contractual relationship or obligation whatsoever. Affiant further avers that said rolls hereinbefore mentioned have been discontinued even though the same rolls are on sale in many establishments in the city of Washington and some of them the largest in said city, and further, although no question had ever been raised by the Union or any member thereof at any time in regard to their sale on the premises of plain-

tiff, even though the said defendant union had been delivering bread to plaintiff from Hinkle's Bakery over a long period of time before this occasion not only by the driver Wolf but by others who preceded him. Affiant further say that the defendant union through its drivers delivers many other articles of merchandise to plaintiff among which are items of bread from other bakeries and other similar articles for his store as a delicatessen establishment and that never was any question raised with regard to the rolls to which Andre pointed on that occasion.

[fol. 13] Affiant further says that following the receipt of the letter hereinbefore mentioned and Andre's conversation, the said defendant Union has taken every occasion which it could possibly take to prevent your plaintiff from purchasing bread, either wholesale or retail; that the defendant caused all deliveries of bread to plaintiff to be stopped; that through its agents it advised or otherwise by telephone practically all of the bakeries in the city of Washington and even retail stores, and threatened said bakeries and stores that they would in turn each be cut off from deliveries of merchandise to them in the event they or either of them sold bread to the plaintiff; that more particularly they would pull their Union drivers from all bakeries, thereby preventing deliveries of bread and from the stores they would prevent deliveries of merchandise thereto.

Your affiant is informed and believes and therefore avers and says he will be able to prove upon the trial of this cause that said defendant Union through its agents went so far as to threaten to prevent deliveries of all merchandise of all kinds to the plaintiff including deliveries interstate and through the Express Companies and of all types and character of merchandise which the plaintiff carries for retail sale numbering many hundreds of items as hereinbefore set forth; that more particularly the defendants through its agents threatened to cut off all delivery and supply of milk, ice cream and other essential food products required by the plaintiff in serving many in the Armed Forces their lunches, etc., and their families and others who live in the neighborhood of said plaintiff's business; that the plaintiff conducts the only restaurant in that particular neighborhood which is heavily populated and widely scattered; that the Red Cross Overseas Training Unit and the Naval Communications and the Waves Barracks Center are all located in the neighborhood of plaintiff's place of

[fol. 14] business and that he has been accustomed to give luncheons and dinners to many from said Centers aforesaid; that the result of the threats made by the defendant through its agent aforesaid has made it practically impossible for him to purchase bread from any source of supply, either wholesale or retail in the District of Columbia; that he has been not only greatly inconvenienced but that the conduct of the defendant has made it almost impossible for him to continue the conduct of his business which depends so much upon his ability to supply bread to his customers. There are attached hereto certain affidavits in support of his allegations made herein to which he refers and makes part of this his affidavit in order to advise and inform the Court of the extent to which the defendant Union through its officers and agents has gone to prevent your plaintiff from obtaining bread either wholesale bakeries or at retail from retail stores.

Your affiant further says that he is financially willing and able to pay any indebtedness he owes to the owners of Hinkle's Bakery; that his conduct throughout the years in which he has been purchasing bread from that bakery has been satisfactory and that never was there any occasion for any dispute to arise between him and the owners of said bakery; that the defendant Union is now attempting by its conduct hereinbefore described, to compel the payment of a small item of $12.22 without determining the justice of the payment whether that amount is owed or not and without right in law so to do, and this to one of its drivers from whom the plaintiff never purchased any bread whatsoever, with whom the plaintiff never entered into any contractual relationship whatsoever and to whom the plaintiff could make no payment legally either in protection to himself or payment of an indebtedness owed to an entirely different person, to wit, the owners of the Hinkle Bakery.

[fol. 15] Your affiant is further informed and believes and therefore avers that the defendant Union through its officers is engaged in the practice of calling upon various bakeries and suppliers of merchandise who had theretofore been accustomed to sell to plaintiff and advising such wholesalers and suppliers that your plaintiff was indebted to a member of said defendant Union and refused to pay him. Your affiant says that plaintiff has always possessed a high reputation for financial integrity among the trade and public generally with which the plaintiff has dealt; that plain-

tiff has never owed any obligation which plaintiff has not met fully and in accordance with its terms; that plaintiff considers her financial reputation as one of plaintiff's greatest assets and that in truth and in fact the defendant Union through its officers and agents by calling upon said wholesalers and suppliers has greatly damaged your plaintiff in the esteem and reputation which the plaintiff theretofore bore; that any such statement as made by said Union is false, without foundation in fact, and as well known to the said defendant, contrary to the entire course of conduct of the plaintiff throughout the plaintiff's business dealings, not only with the Hinkle Bakery but with all wholesalers and suppliers of merchandise with whom plaintiff has had business. Your affiant further avers that the said statement so made by said defendant has been maliciously made in order to force and compel arbitrarily and capriciously your plaintiff to do and perform the wishes of the defendant Union without consideration of the damage already accomplished to the plaintiff's business and which in the future will be further done unless the said conduct of the defendant Union is enjoined by the Court.

Benjamin Wagshal.

Subscribed and sworn to before me this 4th day of September, 1945. Emily V. McKenzie, Notary Public, D. C.

[fol. 16]. [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

C. A. #30-226

A. WAGSHAL, etc., Plaintiff,

vs.

BAKER SALES DRIVERS LOCAL UNION #33, et al., Defendants

JUDGMENT FOR INJUNCTION, PENDENTE LITE—Filed September 7, 1945

Upon consideration of plaintiff's motion for an injunction and defendant's motion to dismiss plaintiff's complaint, it is this 7th day of September, 1945,

Ordered: that the defendants, Bakery Sales Drivers Local Union No. 33 and Charles M. Andre, and each of their officers, members, agents, servants, confederates, and associates, howsoever, and all persons acting in aid of, or in conjunction with them or any of them be, and they hereby are, restrained and enjoined, until the final decree in herein action, from conspiring, agreeing or combining in any manner to restrain, obstruct or destroy the business of the complainant, or to prevent the complainant from carrying on the same without interference from them or any of them, and from threatening, intimidating, requiring or in any manner preventing any and all bakeries wheresoever located from selling, delivering and serving their products to complainant, and any and all other suppliers of merchandise or service, who do or may sell, deliver or serve complainant with any merchandise or service of any kind whatsoever, and from picketing complainant's place of business, and from uttering, or in any manner publishing of complainant anything whereby complainant's credit can or may be impaired, and from conducting any boycott whatever against complainant or in connection with the conduct of her business, and from in any manner whatsoever impeding, obstructing, interfering, with or restraining the complainant's business, and from soliciting, directing, aiding, assisting, or abetting any person or persons, company or corporation to do or cause to be done any of the acts or things aforesaid.

Provided the complainant shall first execute and file in this action with surety approved by the Court, an undertaking in the sum of $500.00 to make good to defendants all [fol. 17] damage by them suffered by reason of wrongfully and inequitably suing out this injunction.

T. Alan Goldsborough, Justice.

Sept. 7, '45.

Counsel for defendants has read the foregoing proposed order and objects to the whole thereof.

Jos. A. Padway, Attorney for Defendants.

[fol. 18] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

C. A. 30-226

A. WAGSHAL, etc., Plaintiff,

vs.

BAKERY SALES DRIVERS LOCAL UNION No. 33, et al., Defendants

ORDER DENYING MOTION TO DISMISS—September 7, 1945

Upon consideration of defendants' motion, plaintiffs answer, and upon consideration thereof, it is this 7th day of September, 1945.

Ordered: that defendants' motion to dismiss plaintiff's complaint, be, and the same is hereby denied.

T. Alan Goldsborough, Justice.

[fols. 19-20] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

NOTICE OF APPEAL—Filed September 10, 1945

Notice is hereby given this 10th day of September, 1945, that Bakery Sales Drivers Local Union No. 33 and Charles M. Andre hereby appeal to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 7th day of September, 1945, in favor of A. Wagshal, trading as "Wagshal's Delicatessen," against said Bakery Sales Drivers Local Union No. 33 and Charles M. Andre.

Jos. A. Padway, Attorney for Bakery Sales Drivers Local Union No. 33 and Charles M. Andre.

Mail copies to:

Wm. E. Leahy, 821 15th St., N. W., Bowen Bldg.
Philip Wagshal, 1404 N. Y. Ave., N. W., Bond Bldg.
Nicholas J. Chase, 821 15th St., N. W., Bowen Bldg.

[fol. 21] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 9121

BAKERY SALES DRIVERS LOCAL UNION No. 33, an Unincorporated Association,

and

CHARLES M. ANDRE, Appellants,

vs.

A. WAGSHAL, Trading as "Wagshal's Delicatessen," Appellees

MOTION TO DISMISS APPEAL—Filed April 3, 1946

Comes now the appellee, A. Wagshal, trading as "Wagshal's Delicatessen," by her attorneys, William E. Leahy, Nicholas J. Chase and Philip Wagshal, and respectfully moves the Court to dismiss the appeal in the above cause for the reason that the Order sought to be reviewed is not appealable.

On September 7, 1945, the Court below denied appellants' Motion to Dismiss the Complaint and granted appellee's Motion for a Preliminary Injunction pending final hearing. On September 10, 1945, appellants filed a Notice of Appeal. Appellants, also, on September 11, 1945, filed Notice of Intention to Apply for an Allowance of a Special Appeal. After briefs were filed by both parties, this Court denied the Special Appeal.

The cause was set down for pretrial on October 15, 1945, and for trial on October 22, 1945. The Court below had directed that the case should be advanced for trial and appellants and appellee consented to set the case down for final hearing on October 22, 1945. The case did not come on for hearing for the reason that the attorney for appellants was engaged in other matters. Later in the Fall of 1945, [fol. 22] the attorneys for both parties became engaged in various trials and the matter did not come on for final hearing. For the past several months the attorneys for the appellee have been ready for trial but for one reason or another counsel for the appellants have not been. These delays have occurred notwithstanding the direction of the Court below that the case be advanced for trial. The fore-

going is recited in order that this Court may understand the present posture of the cause in the Court below. Details may be found in the brief of appellee filed in Opposition to Petition for Allowance of Special Appeal.

The present appeal is an appeal from an Order granting a preliminary injunction and an Order denying a Motion to Dismiss the Complaint. We respectfully submit that on basic principles neither Order is a final Order, appealable under the organic statute creating this Court and, more particularly, under the decisions of the Court construing the said statute.

This Court in *New Negro Alliance, et al vs. Harry Kaufman,* 78 F. 2d 415; 64 App. D. C. 362, held that an Order granting a preliminary injunction, identical with the present Order, was not a final Order from which an appeal would lie and, accordingly, dismissed the appeal as having been prematurely brought. The mandate on reversal, while providing for dismissal of the appeal, did so without prejudice to any of the rights of the appellants to proceed further in the case in the trial Court. The cause was remanded to that Court for further proceedings.

The organic Statute, D. C. Code (1929), Title 18, Section 26; D. C. Code (1940), Title 17-101, was further construed by this Court in *Laughlin v. Berens,* 128 F. 2d 23; 75 App. D. C. 411 (1942), where after citing *New Negro Alliance v. Harry Kaufman,* and other decisions, this Court said:

> [fol. 23] "The cases referred to indicate that Congress by the statute intended to permit appeals only from interlocutory orders which if carried into effect would change or affect the actual possession of property as it existed immediately before the orders, i.e., intended to permit appeals from orders which would change the status quo ante the orders."

An examination of the aforesaid decisions, together with the opinions in the decisions set forth in the notes appended to Title 17-101, D. C. Code, 1940, would seem to make clear, beyond dispute, the conclusion that the Orders of September 7, 1945, from which appellants are now seeking to appeal are not appealable within the class of Orders described in D. C. Code, 1940, Title 17-101.

With respect to the Order overruling the Motion to Dismiss the Complaint, it would appear that *Toomey v. Toomey,* No. 8915, United States Court of Appeals for the District

of Columbia, decided April 16, 1945, and reported in Volume LXXIII, page 648, is determinative. There this Court held that the overruling of a Motion to Dismiss the original Complaint is not a final Order within the meaning of the D. C. Code, 1940, Title 17-101.

In conclusion it is respectfully submitted that sound reasons of policy, aside from the technical jurisdictional requirements, dictate that the instant cause be brought on for final hearing in the Court below before this Honorable Court is asked to pass on the questions of law involved.

Respectfully submitted, William E. Leahy, Nicholas J. Chase, 821 15th Street, N. W.; Philip Wagshal, Bond Building, Attorneys for Appellee.

Service of copy of above Motion to Dismiss Appeal had by personally serving Joseph A. Padway, attorney for Appellants, 821 15th Street, N. W., Washington, D. C., this 3rd day of April, 1946.

Nicholas J. Chase.

[fol. 24] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

ORDER FOR ARGUMENT—May 13, 1946

On consideration of appellee's motion to dismiss the above-entitled appeal, and the Court desiring to hear argument on the question whether the case involves a labor dispute under the Norris-La Guardia Act, It is

Ordered that the case be placed on the summary docket and set for argument at the June Term on the single question hereinbefore noted.

Per Curiam.

Dated May 13, 1946.

[File endorsement omitted.]

[fol. 25] [File endorsement omitted]

UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA

No. 9121

BAKERY SALES DRIVERS LOCAL UNION No. 33, an Unincorporated Association, and CHARLES M. ANDRE, Appellants

v.

A. WAGSHAL, Trading as "Wagshal's Delicatessen," Appellee

Appeal from the District Court of the United States for the District of Columbia

OPINION—Decided April 28, 1947

Mr. Herbert S. Thatcher, with whom Mr. Joseph A. Padway and Miss Jacqueline Wemple were on the brief, for appellants.

Mr. William E. Leahy, with whom Mr. Philip Wagshal and Mr. Nicholas J. Chase were on the brief, for appellee.

Before Edgerton, and Clark and Wilbur K. Miller, JJ.

CLARK, J.:

Technically, this cause is before us on an appeal from an order of the District Court overruling appellants' Motion to Dismiss and an order of the District Court granting an injunction pendente lite against appellants. Appellants' petition for allowance of a special appeal from the same orders, filed subsequent to the filing of the Notice of Appeal of right, was denied by this Court at the October term, 1945. Appellee moved to dismiss the appeal on the ground that neither order is a final order appealable to this Court. Appellants answered this motion to dismiss by alleging that the cause involved a "labor dispute" and was appealable as a matter of statutory right under the Norris-LaGuardia Act. This Court at the April term, 1946, ordered that the case be placed on the summary docket and set for argument on the single question as to whether the case involves a labor dispute under the terms of the Norris-LaGuardia Act. That, therefore, is the only question now to be considered by this Court.

This litigation arises out of these facts. Appellee here, plaintiff below, is the owner and operator of a delicatessen. Appellants, defendants below, are a local union organization of bakery drivers, as well as the Union's business agent. Appellee had been for a number of years the purchaser of a considerable quantity of bakery products from Hinkle's Bakery, delivered by a Union driver, who, it is undisputed, was an employee of Hinkle and not of appellee. For some [fol. 26] time prior to July 5th, 1945, the Union driver had been making deliveries to appellee at the noon hour.

This schedule was unsatisfactory to appellee because a luncheon business was operated in conjunction with the delicatessen and at this hour it was inconvenient, if not impossible, for appellee to check the bakery delivery with the driver. Appellee requested delivery at a later hour. Thereafter, Hinkle's Bakery advised appellee that the driver would make no further deliveries to her establishment and that the bakery could make and furnish appellee with no more bakery supplies. Appellee then turned to other sources for supplies and secured another connection on terms mutually agreeable to both parties.

It is undisputed that throughout the relationship between Hinkle and appellee, appellee had been consistently in the habit of paying all accounts directly to Hinkle.

On July 26, 1945, business agent Andre, representing the Union, appeared at appellee's place of business and stated that $150 was due and owing to the bakery driver who had refused further deliveries. Demand for immediate payment was made. Appellee's manager countered with the claim that he did not owe the driver anything since his practice had always been to pay directly to the bakery.

On this visit the Union representative demanded that payment be made to the driver, and also told appellee that he should immediately stop selling a certain non-Union made item that he observed in appellee's establishment. The latter portion of the demand was complied with by appellee and the sale of the non-Union item was discontinued. Appellee's manager was told that if he did not comply with all of these demands the drivers' Union would stop all shipments of bakery, milk and dairy products coming to his store from any source, even by Railway Express from outside the District of Columbia. Shortly thereafter appellee made payment, by check, to the bakery, conformable to her contractual relationship with the bakery and as had

always been her practice. The check was returned by the Union representative with a letter which stated that it could not be accepted in settlement because "it was $12.22 short of the amount which is owned (sic) to our member, Leon Wolf."

On July 27, 1945, the New Philadelphia bakery which had been delivering bakery products to appellee, notified appellee that no more deliveries could be made inasmuch as appellant Union had threatened to pull out all of its drivers if any products of any sort were sold or delivered to appellee.

Sometime late in July 1945, the drivers' Union set up a boycott against appellee which was successful in keeping appellee from purchasing bread either from bakers or retail stores in Washington or surrounding territory, even to the extent of a single loaf of bread. In addition to the boycott, aimed at shutting off the necessary food supplies, appellee's business was picketed by defendant Andre personally and by others and it was generally stated by the Union that appellee was involved in a "labor dispute" with the Union.

In addition to the undoubtedly effective boycott as to bakery products, plaintiff's complaint alleged (and it must be taken to be admitted by the defendants' motion to dismiss) that the defendants had also threatened to prohibit in like manner all deliveries and sales of milk and dairy products to be made to plaintiffs, which, if not enjoined, [fol. 27] would compel plaintiff to discontinue business to her irreparable damage.

On these essential facts appellee brought a complaint in the lower court asking that the Union be restrained pendente lite and permanently from boycotting and interfering with her business, and from publishing false statements. In addition to the injunctive relief requested, damages in the amount of $50,000 were asked, along with an equal amount of punitive damages. After hearing extensive argument and considering affidavits, the trial court overruled appellants' motion to dismiss and granted appellee's petition for an injunction pending trial.

Under this court's order, as noted supra, the single question before us now is: Does the complaint show the existence of a "labor dispute" as the term is defined in the Norris-LaGuardia Act.[1]

---

[1] 29 U. S. C. 101.

If the question is to be answered in the affirmative, it seems clear that the temporary injunction was erroneously granted, for the standards prescribed by Section 7 and 9 of the Act as necessary to the issuance of injunctive relief were not met.[2]

In our opinion the facts of the instant case are so different from those in the two leading cases in this court cited

---

[2] Section 7 reads in pertinent part: "No Court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in sections 1-15 of this title, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

"(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued, on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

"(b) That substantial and irreparable injury to complainant's property will follow;

"(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

"(d) That complainant has no adequate remedy at law; and

"(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection."

Section 9 provides: "No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order

and relied upon by appellants, as to take the case clearly outside those decisions.[3] In those cases exacting considera-
[fol. 28] tion was given to the underlying principles which support the Norris-LaGuardia Act, and we are not disposed to modify or repudiate the policy fundamentals expressed in those opinions. We are here concerned with the specific problem of determining whether the trial court was correct in its judgment that on the facts before it no "labor dispute" within the terms of the Act, and the decisions under it, was made out.

In the first place appellants appear to urge that the mere fact that the complaint was directed toward a union, by a commercial concern which admittedly had some contact but no contractual relations with union members, is sufficient to subject the controversy to the interdiction of the Act. This argument, we think, goes substantially beyond the points decided, and the interpretations established in precedent cases. It is an unwarranted advance from the terms of the statute and the judicial interpretations stating that the proximate relationship of employer and employee need not exist in order that there be shown a labor dispute within the meaning of the law. See *Lauf* v. *Shinner*, 303 U. S. 323; *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552. If we were to accept appellants' argument on this point we would be providing a basis whereby even the most remote and casual association with a union employee, which resulted in disagreement, would be classed a "labor dispute". The protection of labor in its broad programs of organization, and in its specific efforts to advance the individual and collective well being of its membership does not require that we open the way, through interpretative expansion of the

---

or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and shall be expressly included in said findings of fact made and filed by the court as provided in sections 1-15 of this title. Mar. 23, 1932, c. 90, Sec. 9, 47 Stat. 72."

[3] Green v. Obergfell, 73 App. D. C. 300, 121 F. (2d) 46, cert. denied, 314 U. S. 637; Fur Workers Union, Local No. 72 v. Fur Workers Union No. 21238, 70 App. D. C. 122, 105 F. (2d) 1, aff'd 308 U. S. 522.

concept of "labor dispute", to unbridled attacks upon commercial interests which may by chance or misadventure brush a union or a union member. As appears from the decided cases, the courts have been most liberal in holding that wherever the facts show a bona fide labor controversy, founded upon genuine issues involving the protection of labor in pursuing its legitimate objectives, the Norris-LaGuardia Act is an effective bar to injunctive relief . . . even where the employer may in effect be an innocent bystander. It does not follow from this that, where the facts do not support the assertion that there is in *fact* a dispute, the union should have the benefit of the doubt, as against the interest in protecting the rights of private property owners whose business may be jeopardized by labor's antagonism.

The Norris-LaGuardia Act was passed to correct certain great abuses by management in the use of the injunctive process during the earlier struggles of the trades unions to gain economic and social rights for their membership. It was obviously intended by Congress to be a highly remedial Act and as such is to be liberally construed by the courts. And, indeed, it has been construed with the most extreme liberality to such a degree that it might be said with some justice that there have been extensions of the purposes of the Act not by legislative enactment but by judicial legislation. Be that as it may, no court so far as we are advised or have been able to find has ever gone so far in extending and defining the Act as to apply it to a situation where the business agent of a union, having no contractual relations whatever with the proprietor of any business, takes it upon himself to act as the volunteer collection agent for a third party and attempts by threats, picketing and boycott to ruin a legitimate business over a difference of $12.20 between [fol. 29] original parties to a transaction to which the business agent was an intruder and which should have been determined in the Small Claims Branch of the Municipal Court. To maintain that such gratuitous interference on the part of defendant Andre constitutes a "labor dispute" within the careful definitions of the Norris-LaGuardia Act is ridiculous.

As in all cases where two readily acceptable basic policies collide, it is the court's function to weigh and balance the

conflicting interests.[4] Here we have the interests of labor under its protective shield of the anti-injunction legislation to measure against the interests and rights of the appellee. Viewing the problem in the light of facts before the trial court, we think the result which was reached is correct.

Turning to the specific items alleged as constituting a labor dispute we find that the first relied upon is the matter of delivery hours. The appellee admittedly objected to taking delivery at the time the particular driver involved desired or, because of route restrictions, had to make delivery. The question here is whether this amounts to a controversy concerning the "hours of employment." Here appellee asked for a more favorable delivery time, but when told that this driver could not or would not make delivery at any other time, the matter was dropped, and appellee turned to another bakery (also served by union drivers) for supplies. From this situation we fail to perceive how a "dispute" may be said to exist. It cannot create a dispute for a tradesman to accede to the demands of the adversary, and to attempt to conduct a business notwithstanding disadvantages may be suffered by the tradesman.

As for the alleged controversy regarding the money due to the driver, it does not anywhere appear that there was any obligation running from appellee to the driver or to the union. The purchases of bakery products were made from the bakery, and payment was sent to the bakery. So far as appellee was concerned any payment to the driver was a matter between the bakery and the driver, as its employee. This arrangement cannot, in our judgment, be tortured into a dispute as to "wages."

To suggest, as appellants do in their brief, that an employee of an independent contractor (The Hinkle Bakery occupied no relationship to appellee save that of seller and buyer) who, for reasons of his own, refused to continue delivery on behalf of his own employer and induced the employer (Hinkle) to discontinue sales is "a striker," and further to suggest that for appellee to attempt to obtain his

---

[4] See particularly Allen Bradley Co. v. Local Union No. 3, 325 U. S. 797, where Labor's protective legislation was held not to shield the union from the provisions of the Sherman Act.

bakery supplies from other independent sellers is to replace a striker with another laborer, is reductio ad absurdum.

Equally untenable is the theory that because defendant Andre is the business agent of a union and chooses to turn himself into a volunteer collection agent for the Hinkle Bakery he thereby creates a labor dispute within the meaning of the Norris-LaGuardia Act.

There is the further item concerning the non-union product found in appellee's establishment by the union agent. As to this it appears from affidavits in the record that upon receiving the demand to discontinue selling this non-union item, it was eliminated from the products offered for sale by appellee. Appellant contends that appellee cannot rely [fol. 30] upon the affidavits in question because the Act proscribes their use. We think the appellee's response to the contention represents the correct view. The question for determination was a preliminary one to be decided in terms of the trial court's general equitable jurisdiction. To determine whether that jurisdiction existed in the face of the Norris-LaGuardia Act, the court properly took into account the affidavits before it.

There being, in our opinion, no bona fide "labor dispute," we do not think that in the present situation the terms of the injunction require modification.[5]

Appeal dismissed.

EDGERTON, J., *dissenting:*

It seems to me clear that this is a "case involving or growing out of a labor dispute." The Norris-LaGuardia Act forbids injunctions in such cases unless specified requirements are met. These requirements include (1) a complaint under oath; (2) testimony taken in open court; and (3) "findings of fact by the court, to the effect—(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained . . .; (b) That substantial and irreparable injury to complainant's property will follow; (c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting

[5] *Cf.* the underlying fact situation in Thornhill v. Alabama, 310 U. S. 88.

of relief; (d) That complainant has no adequate remedy at law; and (e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection."[1] In this case the complaint was not under oath, no testimony was taken in open court, and no facts were found. It is not even contended that the facts required by the Act existed.

The court states that appellee "requested" delivery at a later hour. Appellee's complaint states that the driver was "required" to deliver at a later hour. Appellee would not take delivery at the old hour and the driver would not make delivery at a new hour. Since the Act makes it immaterial "whether or not the disputants stand in the proximate relation of employer and employee," this dispute concerning the time when the driver's work should be done was as plainly a labor dispute as if it had concerned the introduction of a night shift in a factory. Afterwards a dispute arose over appellee's alleged sale of non-union goods. This also was a familiar type of labor dispute. It is immaterial whether the dispute over the driver's money claim was or was not a labor dispute. One labor dispute brings the Norris-LaGuardia Act into operation. Here there were at least two. Since the boycotting, picketing and other conduct of which appellee complains grew out of these disputes, this is a "case involving or growing out of a labor dispute."

The court takes the somewhat paradoxical position that the disputes regarding working hours and non-union goods [fol. 31] were not labor disputes. Its theory is that there is no labor dispute unless the court thinks the interests the defendants seek to promote are "legitimate" and are more important, on balance, than the conflicting interests of the plaintiffs. The court identifies the statutory term "labor dispute" with the court's concept of a "bona fide labor controversy, founded upon genuine issues involving the protection of labor in pursuing its legitimate objectives." But the Act says nothing about the legitimacy of objectives or the balancing of conflicting interests. The Supreme Court has overruled this court's theory in these words: "To say, as the Circuit Court of Appeals did, that the conflict here is not a good faith labor issue, and that therefore there is no

---

[1] 47 Stat. 71, § 7, 29 U. S. C. § 107. *Cf.* footnote 2 of the opinion of the court.

'labor dispute,' is to ignore the statutory definition of the term . . . ."[2] That definition is: "The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiation, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."[3] The rights and wrongs of the disputes and of the conduct growing out of them, as to which I express no opinion,[4] have nothing to do with the question whether this is a "case involving or growing out of a labor dispute."

The court's ruling comes to this, that the Act has no application to labor activity which a court thinks illegal or improper. But the Act has no practical application to anything else, for courts have never enjoined labor activity which they thought legal and proper. Therefore the court's ruling not only conflicts with the Act but nullifies it. The Act was passed for the very purpose of preventing courts, except in the extraordinary circumstances specified in the Act, from issuing injunctions against labor activity which they thought illegal or improper. There is no finding and no contention that those extraordinary circumstances were present here.

The court holds also, in effect, that to replace a striker with another worker is to "accede to the demands" of the striker,[5] ends any dispute, and prevents further activity on his behalf from growing out of a dispute.

---

[2] *Milk Wagon Drivers' Union, Local No. 753* v. *Lake Valley Farm Products, Inc.*, 311 U. S. 91, 99.

[3] 47 Stat. 73. § 13(c), 29 U. S. C. § 113(c).

[4] Except that the peaceful picketing which the District Court enjoined was within appellants' rights under the Constitution. *Thornhill* v. *Alabama*, 310 U. S. 88; *Bakery and Pastry Drivers and Helpers Local 802* v. *Wohl*, 315 U. S. 769.

[5] It may be that the driver was not technically a striker, since he did not stop working for his immediate employer Hinkle's Bakery. But he is in the same position as a striker for the purposes of the Act and of this case, since the Act makes it immaterial "whether or not the disputants stand in the proximate relation of employer and employee."

[fol. 32] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, APRIL TERM, 1947

No. 9121

BAKERY SALES DRIVERS LOCAL UNION No. 33 &c., et al., Appellants,

vs.

A. WAGSHAL, Trading &c., Appellee

ORDER OF DISMISSAL—April 28, 1947

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and on a motion to dismiss, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that this appeal be, and it is hereby, dismissed, with costs.

Per Mr. Justice Clark.

Dated April 28, 1947.

Dissenting opinion by Mr. Justice Edgerton.

[fol. 33] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

DESIGNATION OF RECORD—Filed June 11, 1947

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above entitled cause, and include therein the following papers contained in the transcript of record for the District Court—

1. Complaint for Injunction and Damages.
2. Motion for Injunction.
3. Motion to Dismiss.
4. Answer to Motion to Dismiss filed by Defendant.

5. Affidavit of Benjamin Wagshal.

6. Judgment for Injunction Pendente Lite, dated September 7, 1945.

7. Order Denying Dismissal of Cause, dated September 7, 1945.

8. Notice of Appeal under Section 10 of Norris-LaGuardia Act.—

and the following papers which are part of the record in the Court of Appeals:

9. Motion to Dismiss Appeal.

10. Order setting case on summary docket for argument at the June Term, 1946.

11. The Majority and Dissenting Opinion.

12. Judgment.

[fol. 34] 13. This designation.

14. Clerk's Certificate.

Joseph A. Padway, Herbert S. Thatcher, Jacqueline Wemple, 736 Bowen Building, Washington 5, D. C., Counsel for Appellants.

[fol. 35] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 36] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 13, 1947

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Rutledge took no part in the consideration or decision of this application.

FILE COPY

Office - Supreme Court, U. S.
FILED
JUL 24 1947
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 225

BAKERY SALES DRIVERS LOCAL UNION No. 33, AN UNINCORPORATED ASSOCIATION, AND CHARLES M. ANDRE,

Petitioners,

vs.

A. WAGSHAL, TRADING AS "WAGSHAL'S DELICATESSEN,"

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

JOSEPH A. PADWAY,
HERBERT S. THATCHER,
JACQUELINE WEMPLE,
736 Bowen Building,
Washington 5, D. C.,
Counsel for Petitioners.

INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Opinions below	2
Jurisdiction	2
Summary statement of facts and matter involved	2
The question presented	5
The statute involved	5
Reasons relied on for granting of writ	5
Prayer	8
Appendix A	10
Appendix B	20

Table of Cases Cited

Allen Bradley Co. v. *Local Union No. 3*, 325 U. S. 797	15
Bakery and Pastry Drivers and Helpers Local 802 v. *Wohl*, 315 U. S. 769	19
Fur Workers Union, Local No. 72 v. *Fur Workers Union No. 21238*, 70 App. D. C. 122, 105 F. (2d) 1, aff'd 308 U. S. 522	14
Green v. *Obergfell*, 73 App. D. C. 300, 121 F. (2d) 46, cert. denied 314 U. S. 637	14
Lauf v. *Shinner*, 303 U. S. 323	14
Milk Wagon Drivers' Union v. *Lake Valley Farm Products*, 311 U. S. 91, at 99	7, 19
New Negro Alliance v. *Sanitary Grocery Co.*, 303 U. S. 552	14
Thornhill v. *Alabama*, 310 U. S. 88	17, 19
United States v. *Hutcheson*, 312 U. S. 219, at 232	7

Statutes Cited

Section 240(a) of the Judicial Code as amended	2
Section 7 of the Norris-LaGuardia Act	4
Title 17, Sec. 17-101 of the District of Columbia Code	4
Norris-LaGuardia Act, 47 Stat. 70, 129 U. S. C. 101	5
47 Stat. 71, § 7, 29 U. S. C. § 107	18
47 Stat. 73 §13(c), 29 U. S. C. §113(c)	19

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No.

BAKERY SALES DRIVERS LOCAL UNION No. 33, AN UNINCORPORATED ASSOCIATION, AND CHARLES M. ANDRE,

Petitioners,

vs.

A. WAGSHAL, TRADING AS "WAGSHAL'S DELICATESSEN,"

Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Justices of the Supreme Court of the United States:

The above named petitioners respectfully petition for a writ of certiorari to review a decision of the United States Court of Appeals for the District of Columbia, rendered on April 28, 1947. The said decision sustained orders of the United States District Court for the District of Columbia (1) overruling petitioners' motion to dismiss a complaint for injuction filed by respondent, and (2) granting an injunction *pendente lite* against picketing and boycotting by petitioners.

Opinions Below

The District Court did not render a decision, nor did it make any findings of fact or conclusions of law. The opinion of the Court below is reported in 161 Fed. (2d) 380, and appears on page 19 of the Record. A copy of such decision by Justice Bennett Champ Clark, with the dissent thereto by Justice Henry White Edgerton, is attached hereto as Appendix "A".

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended. Judgment below was entered on April 28, 1947 (R. 29).

Summary Statement of Facts and Matter Involved

This is an appeal from a decision of the Court of Appeals which sustained two orders of the District Court, the one overruling petitioners' motion to dismiss the complaint herein, and the second granting a temporary injunction pending a trial. Thus, the case was presented to the Court below under the facts alleged in respondent's complaint. In addition, respondent filed supporting affidavits which were considered by the Court below and by the trial court.

The allegations of the complaint (R. 1) show that respondent is the owner and operator of a delicatessen in the District of Columbia, and is also engaged in serving meals to the public, and that petitioners are a local organization of bakery drivers and its business representative, Mr. Charles M. Andre. The complaint seeks to enjoin petitioners from engaging in peaceful picketing and boycotting against respondent.

The matters out of which the dispute between the parties arose are succinctly set forth in paragraphs 3 and 4 of the

complaint* They indicate disputes over the following: (1) the time of delivery of bakery products; (2) payment of a sum claimed owing a union driver as compensation for delivery of bakery products; (3) the sale by respondent of a non-union made item.

As to the first dispute, the complaint alleges that it was resolved by respondent arranging for another bakery to

---

* Paragraphs 3 and 4 of the complaint read as follows:

"3. The defendant number one is an un-incorporated association, commonly called a 'labor union' composed of many members who are mostly bakery drivers. About 2 months prior to to wit, July 5, 1945, one of said member drivers of said defendant union, started to deliver bakery products for Hinkle's bakery, which plaintiff has dealt with for several years. Due to the repeated deliveries of said bakery products to plaintiff during the busy noon hour, he was on to wit, the day aforesaid, required to bring said products, bread, etc., back at a later hour. Shortly thereafter, the said Hinkle bakery, informed plaintiff that the said driver would make no more deliveries to plaintiff and therefore the bakery could make and furnish plaintiff with no bakery products. Plaintiff did immediately thereupon arrange with another bakery to secure its bakery products, the same which were delivered to the plaintiff.

"4. On to wit, July 26, 1945, one Charles M. Andre, the other defendant herein, came in plaintiff's said place of business, and after stating that he was the agent of defendant union, and that a certain sum, about $150.00 was owing to the driver by plaintiff, and that it had to be paid immediately. The plaintiff informed the said agent that no dealings were had with the driver of Hinkle's bakery, that the account had always been with the bakery, and that payment was at all time made direct to the bakery by check, and never to the driver; that whatever was due Hinkle's bakery would be paid in the regular course and upon adjustment made. Defendant Andre stated he was not concerned in any adjustments or account, that payment would have to be made to the driver in full, and further that unless plaintiff immediately discarded and discontinued carrying for sale a certain non-union made item, of the many hundreds of foods, carried by plaintiff aforesaid, his union would stop and prevent any more bread and bakery products, also all dairy products, also all shipments from outside of the District of Columbia made by Railway Express Co., from being delivered to the plaintiff; that his union was formed and maintained to enforce its demands and were able to do so. Shortly thereafter payment of the balance due by plaintiff to Hinkle's bakery was made direct to said bakery minus certain credits, said payment was thereafter returned by defendant union with a letter signed by defendant Andre as president, setting forth that the payment, 'which is owned to our member, Leon Wolfe, cannot be accepted.'"

deliver its bakery products at the time required by respondent, thus displacing petitioner. As to the second dispute, the complaint alleges that the sum in question was owed by the bakery rather than by respondent, the driver not being in respondent's employ, and that respondent was obligated to pay for such deliveries only to the bakery which would then pay the driver. As to the third dispute, the complaint is silent concerning its alleged disposition, but a supporting affidavit (R. 8) alleges that respondent discontinued the sale of the non-union made item.

The complaint then alleges that on respondent's refusal to accede to petitioners' demands in the three disputes, petitioners peacefully picketed and boycotted respondent's place of business, causing respondent irreparable damage. The complaint was not verified and contained none of the allegations required under Section 7 of the Norris-LaGuardia Act.

A motion for an injunction (R. 5) and a motion to dismiss on grounds of insufficiency of the complaint and lack of jurisdiction of the Court under the Norris-LaGuardia Act (R. 5) were jointly submitted to Judge Goldsborough on September 5, 1945. After hearing arguments, the Court, on September 7, 1945, entered orders overruling the motion to dismiss and granting respondent's application for an injunction pending trial (R. 13, 14). The Court did not hear the testimony of any witnesses under oath; neither did the Court make any findings of fact or otherwise comply with the requirements of Sections 7 and 9 of the Norris-LaGuardia Act.

Petitioners then applied to the Court of Appeals for the allowance of a special appeal pursuant to Title 17, Sec. 17-101 of the District of Columbia Code and, in addition, took an appeal as a matter of right under Section 10 of the Norris-LaGuardia Act. The petition for the allowance of

a special appeal was denied by the Court of Appeals, but that Court entertained a general appeal and set the case for argument on the single question of whether the case involved a labor dispute under the terms of the Norris-LaGuardia Act (R. 18). After hearing arguments, a majority of that Court sustained the orders of the District Court, holding in substance that the disputes set forth in the complaint were not labor disputes under the Norris-LaGuardia Act because petitioners' demands did not involve *bona fide* labor controversies and were illegal and improper (R. 18). The majority stated in this respect that the disputes did not embrace "a *bona fide* labor controversy, founded upon genuine issues involving the protection of labor in pursuing its legitimate objectives."

The Question Presented

The sole question involved herein is whether the case involves a labor dispute under the definition of that term in the Norris-LaGuardia Act so as to render the complaint insufficient as a matter of law and so as to deprive the District Court of jurisdiction to issue an injunction without the taking of testimony and the making of findings as required under the Norris-LaGuardia Act.

The Statute Involved

The statute involved herein is the Norris-LaGuardia Act, 47 Stat. 70, 129 U. S. C. 101. The portions relevant to a determination of the issues herein are set forth in Appendix "B."

Reasons Relied On for Granting of Writ

1. This case involves an important question concerning the interpretation and application of the Norris-LaGuardia Act. A majority of the Court below condoned a broad in-

junction against peaceful picketing and boycotting, issued without the taking of testimony or the making of findings of fact, and this under a complaint which showed not one but three separate labor disputes between a union and an employer. The Court dispensed with two of the disputes by terming them improper and illegal, and dismissed the third dispute by referring, erroneously under the Norris-LaGuardia Act, to an affidavit alleging that the dispute had been settled. As accurately and cogently demonstrated by the dissenting opinion of Judge Rutledge, the majority below, by undertaking to pass upon the merits or lack of merits of the particular dispute between an employer and a labor organization, acted in obvious disregard of the provisions of the Norris-LaGuardia Act which withdraws jurisdiction of the District Courts in any case involving a labor dispute as defined in the Act regardless of the alleged merits of the dispute. Paragraphs 3 and 4 of the complaint clearly set forth at least several "labor disputes" concerning terms or conditions of employment between a union and "employees" on the one hand and an "employer" on the other within the broad definition of the terms in the Norris-LaGuardia Act. A dispute over the time "required" by the employer for the making of deliveries is certainly one involving working conditions which cannot be resolved by displacement of the striking driver. A dispute over compensation for work performed is one involving wages; it is a principal function of many labor organizations, as expressed in their constitutions, to assist in the collection of current wages, and, in any event, such practice is not one which Congress has excluded from the application of the Norris-LaGuardia Act. Finally, there is no more usual or customary labor dispute than that over the use or sale of non-union made goods, and to refer to an outside affi-

davit for the purpose of concluding that the dispute has ended is to ignore an essential purpose of the Norris-LaGuardia Act, namely, that of requiring the courts to hear concrete testimony under oath and with opportunity for cross-examination before exercising their powers of injunction. If the District Courts are permitted to inquire into the merits, propriety or legality of disputes between unions and employers which are within the statutory definition of a labor dispute, the purposes and objectives of the Norris-LaGuardia Act would be entirely frustrated.

2. The decision of the Court below is in direct conflict with two applicable decisions of this Court, both of which preclude judicial inquiry into the propriety or merits of any labor dispute as so defined in the Norris-LaGuardia Act. In *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products*, 311 U. S. 91, at 99, this Court held that:

> "Whether rightly or wrongly, the defendant union believed that the 'vendor system' was a scheme or device utilized for the purpose of escaping the payment of union wages and the assumption of working conditions commensurate with those imposed under union standards. *To say, as the Circuit Court of Appeals did, that the conflict here is not a good faith labor issue, and that therefore there is no 'labor dispute', is to ignore the statutory definition of the term;* to say, further, that the conditioned abandonment of the vendor system, under the circumstances, was an issue unrelated to labor's efforts to improve working conditions, is to shut one's eyes to the everyday elements of industrial strife. (Emphasis supplied.)

In *United States* v. *Hutcheson*, 312 U. S. 219, at 232, this Court held in respect to Section 20 of the Clayton Act (of which the Norris-LaGuardia Act is a narrowing extension,

United States v. *United Mine Workers*, decided March 6, 1947.) that

> "... So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under Sec. 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means."

The Court further held in that same case, in respect to the Norris-LaGuardia Act, as follows:

> "... But we need not determine whether the conduct is legal within the restrictions which *Duplex Co.* v. *Deering* gave to the immunities of Sec. 20 of the Clayton Act. Congress in the Norris-LaGuardia Act has expressed the public policy of the United States and defined its conception of a 'labor dispute' in terms that no longer leave room for doubt."

In thus ignoring the plain language of the Norris-LaGuardia Act in utter disregard of its essential purpose and objectives, and in disregarding applicable decisions of this Court upon the very point in issue, it is respectfully submitted that the Court of Appeals for the District of Columbia has committed grievous error requiring amendment by this Court. The decision below, if allowed to stand, would operate as strong precedent for return to the era of judicial rather than legislative determination of the merits of labor controversies, an era supposedly closed by the Norris-LaGuardia Act as a matter of national policy.

Prayer

WHEREFORE, petitioners pray for a writ of certiorari to issue from this Honorable Court reviewing the judgment of the United States Court of Appeals for the District of

Columbia entered in this cause April 28, 1947, to the end that the judgment of that Court be reversed by this Honorable Court and that your petitioners have such other and further relief in the premises as to this Honorable Court may seem lawful and just.

JOSEPH A. PADWAY,
HERBERT S. THATCHER,
JACQUELINE WEMPLE,
736 Bowen Building,
Washington 5, D. C.,
Counsel for Petitioners.

APPENDIX A

UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA

No. 9121

BAKERY SALES DRIVERS LOCAL UNION No. 33, an Unincorporated Association, and CHARLES M. ANDRE, *Appellants*,

v.

A. WAGSHAL, Trading as "Wagshal's Delicatessen," *Appellee*

Appeal from the District Court of the United States for the District of Columbia

Decided April 28, 1947

Mr. Herbert S. Thatcher, with whom Mr. Joseph A. Padway and Miss Jacqueline Wemple were on the brief, for appellants.

Mr. William E. Leahy, with whom Mr. Nicholas J. Chase was on the brief, for appellee.

Before Edgerton, and Clark and Wilbur K. Miller, JJ.

CLARK, *J.*:

Technically, this cause is before us on an appeal from an order of the District Court overruling appellants' Motion to Dismiss and an order of the District Court granting an injunction pendente lite against appellants. Appellants' petition for allowance of a special appeal from the some orders, filed subsequent to the filing of the Notice of Appeal of right, was denied by this Court at the October term, 1945. Appellee moved to dismiss the appeal on the ground that neither order is a final order appealable to this Court. Appellants answered this motion to dismiss by alleging that the cause involved a "labor dispute" and was appealable as a matter of statutory right under the Norris-LaGuardia Act. This Court at the April term, 1946, ordered that the

case be placed on the summary docket and set for argument on the single question as to whether the case involves a labor dispute under the terms of the Norris-LaGuardia Act. That, therefore, is the only question now to be considered by this Court.

This litigation arises out of these facts. Appellee here, plaintiff below, is the owner and operator of a delicatessen. Appellants, defendants below, are a local union organization of bakery drivers, as well as the Union's business agent. Appellee had been for a number of years the purchaser of a considerable quantity of bakery products from Hinkle's Bakery, delivered by a Union driver, who, it is undisputed, was an employee of Hinkle and not of appellee. For some time prior to July 5th, 1945, the Union driver had been making deliveries to appellee at the noon hour.

This schedule was unsatisfactory to appellee because a luncheon business was operated in conjunction with the delicatessen and at this hour it was inconvenient, if not impossible, for appellee to check the bakery delivery with the driver. Appellee requested delivery at a later hour. Thereafter, Hinkle's Bakery advised appellee that the driver would make no further deliveries to her establishment and that the bakery could make and furnish appellee with no more bakery supplies. Appellee then turned to other sources for supplies and secured another connection on terms mutually agreeable to both parties.

It is undisputed that throughout the relationship between Hinkle and appellee, appellee had been consistently in the habit of paying all accounts directly to Hinkle.

On July 26, 1945, business agent Andre, representing the Union, appeared at appellee's place of business and stated that $150 was due and owing to the bakery driver who had refused further deliveries. Demand for immediate payment was made. Appellee's manager countered with the claim that he did not owe the driver ~~anything since~~ his practice had always been to pay directly to the bakery.

On this visit the Union representative demanded that payment be made to the driver, and also told appellee that he should immediately stop selling a certain non-Union made item that he observed in appellee's establishment. The latter portion of the demand was complied with by appellee

and the sale of the non-Union item was discontinued. Appellee's manager was told that if he did not comply with all of these demands the drivers' Union would stop all shipments of bakery, milk and dairy products coming to his store from any source, even by Railway Express from outside of the District of Columbia. Shortly thereafter appellee made payment, by check, to the bakery, conformable to her contractual relationship with the bakery and as had always been her practice. The check was returned by the Union representative with a letter which stated that it could not be accepted in settlement because "it was $12.22 short of the amount which is owned (sic) to our member, Leon Wolf."

On July 27, 1945, the New Philadelphia bakery which had been delivering bakery products to appellee, notified appellee that no more deliveries could be made inasmuch as appellant Union had threatened to pull out all of its drivers if any products of any sort were sold or delivered to appellee.

Sometime late in July 1945, the drivers' Union set up a boycott against appellee which was successful in keeping appellee from purchasing bread either from bakers or retail stores in Washington or surrounding territory, even to the extent of a single loaf of broad. In addition to the boycott, aimed at shutting off the necessary food supplies, appellee's business was picketed by defendant Andre personally and by others and it was generally stated by the Union that appellee was involved in a "labor dispute" with the Union.

In addition to the undoubtedly effective boycott as to bakery products, plaintiff's complaint alleged (and it must be taken to be admitted by the defendants' motion to dismiss) that the defendants had also threatened to prohibit in like manner all deliveries and sales of milk and dairy products to be made to plaintiffs, which, if not enjoined, would compel plaintiff to discontinue business to her irreparable damage.

On these essential facts appellee brought a complaint in the lower court asking that the Union be restrained pendente lite and permanently from boycotting and interfering with her business, and from publishing false statements. In addition to the injunctive relief requested, damages in the amount of $50,000 were asked, along with an equal amount

of punitive damages. After hearing extensive argument and considering affidavits, the trial court overruled appellants' motion to dismiss and granted appellee's petition for an injunction pending trial.

Under this court's order, as noted supra, the single question before us now is: Does the complaint show the existence of a "labor dispute" as the term is defined in the Norris-LaGuardia Act.[1]

If the question is to be answered in the affirmative, it seems clear that the temporary injunction was erroneously granted, for the standards prescribed by Section 7 and 9 of the Act as necessary to the issuance of injunctive relief were not met.[2]

In our opinion the facts of the instant case are so different from those in the two leading cases in this court cited and

---

[1] 29 U. S. C. 101.

[2] Section 7 reads in pertinent part: "No Court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in sections 1-15 of this title, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court to the effect—

"(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued, on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

"(b) That substantial and irreparable injury to complainant's property will follow;

"(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

"(d) That complainant has no adequate remedy at law; and

"(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection."

Section 9 provides: "No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the

relied upon by appellants, as to take the case clearly outside those decisions.[3] In those cases exacting consideration was given to the underlying principles which support the Norris-LaGuardia Act, and we are not disposed to modify or repudiate the policy fundamentals expressed in those opinions. We are here concerned with the specific problem of determining whether the trial court was correct in its judgment that on the facts before it no "labor dispute" within the terms of the Act, and the decisions under it, was made out.

In the first place appellants appear to urge that the mere fact that the complaint was directed toward a union, by a commercial concern which admittedly had some contact but no contractual relations with union members, is sufficient to subject the controversy to the interdiction of the Act. This argument, we think, goes substantially beyond the points decided, and the interpretations established in precedent cases. It is an unwarranted advance from the terms of the statute and the judicial interpretations stating that the proximate relationship of employer and employee need not exist in order that there be shown a labor dispute within the meaning of the law. See *Lauf* v. *Shinner*, 303 U. S. 323; *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552. If we were to accept appellants' argument on this point we would be providing a basis whereby even the most remote and casual association with a union employee, which resulted in disagreement, would be classed a "labor dispute". The protection of labor in its broad programs of organization, and in its specific efforts to advance the individual and collective well being of its membership does not require that we open the way, through interpretative expansion of the concept of "labor dispute", to unbridled attacks upon commercial interests which may by chance or misadventure brush a union or a union member. As appears from the decided cases, the courts have been most liberal in holding that wherever the facts show a bona fide labor controversy,

---

bill of complaint or petition filed in such case and shall be expressly included in said findings of fact made and filed by the court as provided in sections 1-15 of this title. Mar. 23, 1932, c. 90, Sec. 9, 47 Stat. 72."

[3] Green v. Obergfell, 73 App. D. C. 300, 121 F. (2d) 46, cert. denied, 314 U. S. 637; Fur Workers Union, Local No. 72 v. Fur Workers Union No. 21238, 70 App. D. C. 122, 105 F. (2d) 1, aff'd 308 U. S. 522.

founded upon genuine issues involving the protection of labor in pursuing its legitimate objectives, the Norris-LaGuardia Act is an effective bar to injunctive relief . . . even where the employer may in effect be an innocent bystander. It does not follow from this that, where the facts do not support the assertion that there is in *fact* a dispute, the union should have the benefit of the doubt, as against the interest in protecting the rights of private property owners whose business may be jeopardized by labor's antagonism,

The Norris-LaGuardia Act was passed to correct certain great abuses by management in the use of the injunctive process during the earlier struggles of the trades unions to gain economic and social rights for their membership. It was obviously intended by Congress to be a highly remedial Act and as such is to be liberally construed by the courts. And, indeed, it has been construed with the most extreme liberality to such a degree that it might be said with some justice that there have been extensions of the purposes of the Act not by legislative enactment but by judicial legislation. Be that as it may, no court so far as we are advised or have been able to find has ever gone so far in extending and defining the Act as to apply it to a situation where the business agent of a union, having no contractual relations whatever with the proprietor of any business, takes it upon himself to act as the volunteer collection agent for a third party and attempts by threats, picketing and boycott to ruin a legitimate business over a difference of $12.20 between original parties to a transaction to which the business agent was an intruder and which should have been determined in the Small Claims Branch of the Municipal Court. To maintain that such gratuitous interference on the part of defendant Andre constitutes a "labor dispute" within the careful definitions of the Norris-LaGuardia Act is ridiculous.

As in all cases where two readily acceptable basic policies collide, it is the court's function to weigh and balance the conflicting interests.[4] Here we have the interests of labor

[4] See particularly Allen Bradley Co. v. Local Union No. 3, 325 U. S. 797, where Labor's protective legislation was held not to shield the union from the provisions of the Sherman Act.

under its protective shield of the anti-injunction legislation to measure against the interests and rights of the appellee. Viewing the problem in the light of facts before the trial court, we think the result which was reached is correct.

Turning to the specific items alleged as constituting a labor dispute we find that the first relied upon is a matter of delivery hours. The appellee admittedly objected to taking delivery at the time the particular driver involved desired or, because of route restrictions, had to make delivery. The question here is whether this amounts to a controversy concerning the "hours of employment." Here appellee asked for a more favorable delivery time, but when told that this driver could not or would not make delivery at any other time, the matter was dropped, and appellee turned to another bakery (also served by union drivers) for supplies. From this situation we fail to perceive how a "dispute" may be said to exist. It cannot create a dispute for a tradesman to accede to the demands of the adversary, and to attempt to conduct a business notwithstanding disadvantages may be suffered by the tradesman.

As for the alleged controversy regarding the money due to the driver, it does not anywhere appear that there was any obligation running from appellee to the driver or to the union. The purchases of bakery products were made from the bakery, and payment was sent to the bakery. So far as appellee was concerned any payment to the driver was a matter between the bakery and the driver, as its employee. This arrangement cannot, in our judgment, be tortured into a dispute as to "wages."

To suggest, as appellants do in their brief, that an employee of an independent contractor (The Hinkle Bakery occupied no relationship to appellee save that of seller and buyer) who, for reasons of his own, refused to continue delivery on behalf of his own employer and induced the employer (Hinkle) to discontinue sales is "a striker," and further to suggest that for appellee to attempt to obtain his bakery supplies from other independent sellers is to replace a striker with another laborer, is reductio ad absurdum.

Equally untenable is the theory that because defendant Andre is the business agent of a union and chooses to turn himself into a volunteer collection agent for the Hinkle

Bakery he thereby creates a labor dispute within the meaning of the Norris-LaGuardia Act.

There is the further item concerning the non-union product found in appellee's establishment by the union agent. As to this it appears from affidavits in the record that upon receiving the demand to discontinue selling this non-union item, it was eliminated from the products offered for sale by appellee. Appellant contends that appellee cannot rely upon the affidavits in question because the Act proscribes their use. We think the appellee's response to the contention represents the correct view. The question for determination was a preliminary one to be decided in terms of the trial court's general equitable jurisdiction. To determine whether that jurisdiction existed in the face of the Norris-LaGuardia Act, the court properly took into account the affidavits before it.

There being, in our opinion, no bona fide "labor dispute," we do not think that in the present situation the terms of the injunction require modification.[5]

Appeal dismissed.

EDGERTON, *J., dissenting:*

It seems to me clear that this is a "case involving or growing out of a labor dispute." The Norris-LaGuardia Act forbids injunctions in such cases unless specified requirements are met. These requirements include (1) a complaint under oath; (2) testimony taken in open court; and (3) "findings of fact by the court, to the effect—(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained . . .; (b) That substantial and irreparable injury to complainant's property will follow: (c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief; (d) That complainant has no adequate remedy at law; and (e) That the public officers are charged with the duty to protect complainant's property are unable or un-

[5] 5 *Cf.* the underlying fact situation in Thornhill v. Alabama, 310 U. S. 88.

willing to furnish adequate protection."[1] In this case the complaint was not under oath, no testimony was taken in open court, and no facts were found. It is not even contended that the facts required by the Act existed.

The court states that appellee "requested" delivery at a later hour. Appellee's complaint states that the driver was "required" to deliver at a later hour. Appellee would not take delivery at the old hour and the driver would not make delivery at a new hour. Since the Act makes it immaterial "whether or not the disputants stand in the proximate relation of employer and employee," this dispute concerning the time when the driver's work should be done was as plainly a labor dispute as if it had concerned the introduction of a night shift in a factory. Afterwards a dispute arose over appellee's alleged sale of non-union goods. This also was a familiar type of labor dispute. It is immaterial whether the dispute over the driver's money claim was or was not a labor dispute. One labor dispute brings the Norris-LaGuardia Act into operation. Here there were at least two. Since the boycotting, picketing and other conduct of which appellee complains grew out of these disputes, this is a "case involving or growing out of a labor dispute."

The court takes the somewhat paradoxical position that the disputes regarding working hours and non-union goods were not labor disputes. Its theory is that there is no labor dispute unless the court thinks the interests the defendants seek to promote are "legitimate" and are more important, on balance, than the conflicting interests of the plaintiffs. The court identifies the statutory term "labor dispute" with the court's concept of a "bona fide labor controversy, founded upon genuine issues involving the protection of labor in pursuing its legitimate objectives." But the Act says nothing about the legitimacy of objectives or the balancing of conflicting interests. The Supreme Court has overruled this court's theory in these words: "To say, as the Circuit Court of Appeals did, that the conflict here is not a good faith labor issue, and that therefore there

---

[1] 47 Stat. 71, § 7, 29 U. S. C. § 107. *Cf.* footnote 2 of the opinion of the court.

is no 'labor dispute,' is to ignore the statutory definition of the term . . ."[2] That definition is: "The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiation, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment; regardless of whether or not the disputants stand in the proximate relation of employer and employee."[3] The rights and wrongs of the disputes and of the conduct growing out of them, as to which I express no opinion,[4] have nothing to do with the question whether this is a "case involving or growing out of a labor dispute."

The court's ruling comes to this, that the Act has no application to labor activity which a court thinks illegal or improper. But the Act has no practical application to anything else, for courts have never enjoined labor activity which they thought legal and proper. Therefore the court's ruling not only conflicts with the Act but nullifies it. The Act was passed for the very purpose of preventing courts, except in the extraordinary circumstances specified in the Act, from issuing injunctions against labor activity which they thought illegal or improper. There is no finding and no contention that those extraordinary circumstances were present here.

The court holds also, in effect, that to replace a striker with another worker is to "accede to the demands" of the striker,[5] ends any dispute, and prevents further activity on his behalf from growing out of a dispute.

---

[2] *Milk Wagon Drivers' Union, Local No. 753* v. *Lake Valley Farm Products, Inc.*, 311 U. S. 91, 99.

[3] 47 Stat. 73 § 13(c), 29 U. S. C. § 113(c).

[4] Except that the peaceful picketing which the District Court enjoined was within appellants' rights under the Constitution. *Thornhill* v. *Alabama*, 310 U. S. 88; *Bakery and Pastry Drivers and Helpers Local 802* v. *Wohl*, 315 U. S. 769.

[5] It may be that the driver was not technically a striker, since he did not stop working for his immediate employer Hinkle's Bakery. But he is in the same position as a striker for the purposes of the Act and of this case, since the Act makes it immaterial "whether or not the disputants stand in the proximate relation of employer and employee."

APPENDIX B

On the question of whether plaintiff failed to make certain necessary allegations, and whether the Court failed to observe various procedural requirements in issuing the temporary injunction, the following sections of the Act are applicable:

"Section 7. No Court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in sections 1-15 of this title, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued, on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

"Such hearing shall be held after due and personal notice thereof has been given, in such manner as the

court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court. Mar. 23, 1932, c. 90, Sec. 7, 47 Stat. 71."

"Section 8. No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration. Mar. 23, 1932, c. 90, Sec. 8, 47 Stat. 72."

"Section 9. No restraining order or temporary or permanent injunction shall be granted in a case in-

volving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided in sections 1-15 of this title. Mar. 23, 1932, c. 90, Sec. 9, 47 Stat. 72."

On the question of whether a labor dispute exists making the Norris-LaGuardia Act applicable, the following section is relevant:

"Section 13. When used in sections 1-15 of this title and for the purposes of such sections—(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in this section) of 'persons participating or interested' therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occu-

pation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee. Mar. 23, 1932, c. 90, Sec. 13, 47 Stat. 73."

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 225

BAKERY SALES DRIVERS LOCAL UNION No. 33, An Unincorporated Association, and CHARLES M. ANDRE, *Petitioners*,

v.

A. WAGSHAL, Trading as "Wagshal's Delicatessen," *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF OF PETITIONERS

J. ALBERT WOLL,
HERBERT S. THATCHER,
JACQUELINE WEMPLE,
736 Bowen Building,
Washington 5, D. C.,
Counsel for Petitioners.

Press of Ransdell Inc., Washington, D. C.

INDEX

Subject Index

	Page
Brief of Petitioners	1
Opinions of the Courts Below	1
Jurisdiction	2
The Statute Involved	2
Statement of the Case	2
Specification of Errors	5
The Question Presented	5
Summary of Argument	6
Argument	7
I. The Complaint Indicates that the Present Case Involves Three Labor Disputes Under the Norris-LaGuardia Act, and the Courts Below Erred in Not Dismissing the Complaint and in Permitting an Injunction Without the Taking of Testimony	7
II. The Court Below Erred in Considering Whether the Labor Disputes Were Meritorious	11
Conclusion	15
Appendix A	16
Appendix B	25

Table of Cases Cited

Page

Apex Hosiery Co. v. Leader, 310 U. S. 469 10

Bakery & Pastry Drivers & Helpers Local 802 v. Wohl, 315 U. S. 769 11

Donnelly Garment Co. v. Dubinsky, 154 Fed. (2d) 38 11

Grace Co. v. Williams, 96 Fed. (2d) 478 7

Green v. Obergfell, 121 F. (2d) 46, certiorari denied, 314 U. S. 637 7

In re Blaney, 13 Labor Cases, par. 64,039, decided by the Supreme Court of California October 3, 1947 11

Lauf v. Shinner, 303 U. S. 323 7–12

Milk Wagon Drivers' Union v. Lake Valley Farm Products, 311 U. S. 91 6–11–14

New Bedford Cut Stone Co. v. Journeymen Stone Cutters Ass'n, 274 U. S. 37 10

New Negro Alliance v. Sanitary Gro. Co., 303 U. S. 552 6–7–11–12–13

United States v. Hutcheson, 312 U. S. 219 6–14

Statutes Cited

District of Columbia Code, Title 17, Sec. 17-101 2

Norris-LaGuardia Act, 47 Stat. 70, 129 U. S. C. 101 2

Taft-Hartley Act (Labor-Management Relations Act of 1947), Public Law 101, 80th Cong., passed over Presidential veto June 23, 1947, Sec. 8(b)(4)(A) 11

Miscellaneous

Frankfurter & Greene, "The Labor Injunction"
pp. 24-60; 68-81 12

pp. 60-66 13

Minority Report of Senator Norris, 71st Cong., Calendar No. 884, Rep. 1060, Part 2,
p. 19 12

pp. 11; 15-16 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 225

BAKERY SALES DRIVERS LOCAL UNION No. 33, An Unincorporated Association, and CHARLES M. ANDRE, *Petitioners*,

v.

A. WAGSHAL, Trading as "Wagshal's Delicatessen," *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF OF PETITIONERS

OPINIONS OF THE COURTS BELOW

The District Court did not render a decision, nor did it make any findings of fact or conclusions of law. The opinion of the Court below is reported in 161 Fed. (2d) 380, and appears on page 19 of the Record. A copy of such decision by Justice Bennett Champ Clark, with the dissent thereto by Justice Henry White Edgerton, is attached hereto as Appendix "A."

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended. Judgment below was entered on April 28, 1947 (R. 29). Petitioners applied for a writ of certiorari on July 24, 1947, and such writ was granted on October 13, 1947.

The Statute Involved

The statute involved herein is the Norris-LaGuardia Act, 47 Stat. 70, 129 U. S. C. 101. The portions relevant to a determination of the issues herein are set forth in Appendix "B."

STATEMENT OF THE CASE

This is an appeal from a decision of the Court of Appeals which dismissed an appeal from two orders of the District Court, the one overruling petitioners' motion to dismiss the complaint herein, and the second granting a temporary injunction pending a trial. Thus, the case was presented to the Court below under the facts alleged in respondent's complaint. In addition, respondent filed supporting affidavits which were considered by the Court below and by the trial court.

The allegations of the complaint (R. 1) show that respondent is the owner and operator of a delicatessen in the District of Columbia, and is also engaged in serving meals to the public, and that petitioners are a local labor organization of bakery drivers and its business representative, Mr. Charles M. Andre. The complaint seeks to enjoin petitioners from engaging in peaceful picketing and boycotting against respondent.

The matters out of which the dispute between the parties

arose are succinctly set forth in paragraphs 3 and 4 of the complaint.[1] They indicate disputes over the following: (1) the time of delivery of bakery products; (2) method or practice of making collections for deliveries and delivery service, including payment of a sum claimed owing a union driver as compensation for delivery of bakery products, such sum to be paid by customer (respondent) rather than bakery; (3) the sale by respondent of a non-union made item.

---

[1] Paragraphs 3 and 4 of the complaint read as follows:

"3. The defendant number one is an un-incorporated association, commonly called a 'labor union' composed of many members who are mostly bakery drivers. About 2 months prior to to wit, July 5, 1945, one of said member drivers of said defendant union, started to deliver bakery products for Hinkle's bakery, which plaintiff has dealt with for several years. Due to the repeated deliveries of said bakery products to plaintiff during the busy noon hour, he was on to wit, the day aforesaid, required to bring said products, bread, etc., back at a later hour. Shortly thereafter, the said Hinkle bakery, informed plaintiff that the said driver would make no more deliveries to plaintiff and therefore the bakery could make and furnish plaintiff with no bakery products. Plaintiff did immediately thereupon arrange with another bakery to secure its bakery products, the same which were delivered to the plaintiff.

"4. On to wit, July 26, 1945, one Charles M. Andre, the other defendant herein, came in plaintiff's said place of business, and after stating that he was the agent of defendant union, and that a certain sum, about $150.00 was owing to the driver by plaintiff, and that it had to be paid immediately. The plaintiff informed the said agent that no dealings were had with the driver of Hinkle's bakery, that the account had always been with the bakery, and that payment was at all time made direct to the bakery by check, and never to the driver; that whatever was due Hinkle's bakery would be paid in the regular course and upon adjustment made. Defendant Andre stated he was not concerned in any adjustments or account, that payment would have to be made to the driver in full, and further that unless plaintiff immediately discarded and discontinued carrying for sale a certain non-union made item, of the many hundreds of foods, carried by plaintiff aforesaid, his union would stop and prevent any more bread and bakery products, also all dairy products, also all shipments from outside of the District of Columbia made by Railway Express Co., from being delivered to the plaintiff; that his union was formed and maintained to enforce its demands and were able to do so. Shortly thereafter payment of the balance due by plaintiff to Hinkle's bakery was made direct to said bakery minus certain credits, said payment was thereafter returned by defendant union with a letter signed by defendant Andre as president, setting forth that the payment, 'which is owned to our member, Leon Wolfe, cannot be accepted.'"

As to the first dispute, the complaint charges that it was resolved by respondent arranging for another bakery to deliver its bakery products at the time required by respondent, thus displacing petitioner. As to the second dispute, the complaint alleges that the sum in question was owed by the bakery rather than by respondent, the driver not being in respondent's employ, and that respondent was obligated to pay for such deliveries only to the bakery which would then pay the driver. As to the third dispute, the complaint is silent concerning its alleged disposition, but a supporting affidavit (R. 8) alleges that respondent discontinued the sale of the non-union made item.

The complaint then alleges that on respondent's refusal to accede to petitioners' demands in the three disputes, petitioners peacefully picketed and boycotted respondent's place of business, causing respondent irreparable damage. No violence or threats thereof were alleged. The complaint was not verified and contained none of the allegations required under Section 7 of the Norris-LaGuardia Act.

A motion for an injunction (R. 5) and a motion to dismiss on grounds of insufficiency of the complaint and lack of jurisdiction of the Court under the Norris-LaGuardia Act (R. 5) were jointly submitted to Judge Goldsborough on September 5, 1945. After hearing arguments, the Court, on September 7, 1945, entered orders overruling the motion to dismiss and granting respondent's application for an injunction pending trial (R. 13, 14). The Court did not hear the testimony of any witnesses under oath; neither did the Court make any findings of fact or otherwise comply with the requirements of Sections 7 and 9 of the Norris-LaGuardia Act.

Petitioners then applied to the Court of Appeals for the allowance of a special appeal pursuant to Title 17, Sec. 17-101 of the District of Columbia Code and, in addition, took an appeal as a matter of right under Section 10 of the

Norris-LaGuardia Act. The petition for the allowance of a special appeal was denied by the Court of Appeals, but that Court entertained a general appeal and set the case for argument on the single question of whether the case involved a labor dispute under the terms of the Norris-LaGuardia Act (R. 18). After hearing arguments, a majority of that Court dismissed the appeal from the orders of the District Court, holding in substance that the disputes set forth in the complaint were not labor disputes under the Norris-LaGuardia Act because petitioners' demands did not involve **bona fide** labor controversies and were illegal and improper (R. 18). The majority stated in this respect that the disputes did not embrace "a **bona fide** labor controversy, founded upon genuine issues involving the protection of labor in pursuing its legitimate objectives."

Petitioners then sought a review and reversal of the majority judgment of the court below, and this Honorable Court granted certiorari on October 13, 1947.

SPECIFICATION OF ERRORS

1. The United States Court of Appeals for the District of Columbia erred in holding that the complaint was insufficient and in not dismissing such complaint.

2. The United States Court of Appeals for the District of Columbia erred in holding that the present case did not involve a labor dispute, and that the District Court was without jurisdiction to issue an injunction without the taking of testimony and the making of findings as required under the Norris-LaGuardia Act.

The Question Presented

The sole question involved herein is whether this case involves a labor dispute under the definition of that term in the Norris-LaGuardia Act so as to render the complaint

for injunction insufficient as a matter of law and so as to deprive the District Court of jurisdiction to issue an injunction without the taking of testimony and the making of findings as required under the Norris-LaGuardia Act.

SUMMARY OF ARGUMENT

The complaint herein shows on its face that not only one but three separate labor disputes existed between respondent (an employer) and petitioners (a labor organization and its officers). The trial court disposed of one of the alleged labor disputes by erroneously referring to an affidavit filed by respondent instead of taking testimony and making findings of fact, and disposed of the other two labor disputes by finding them to be without merit and improper. Such a determination flies in the face of the definition of the term "labor dispute", contained in Section 13 of the Norris-LaGuardia Act. That definition makes no distinction between the legality or illegality, the merit or lack of merit, the rightness or wrongness, of any particular labor dispute. In affirming the determination of the trial court under a similar line of reasoning and permitting the trial court to issue a temporary injunction against peaceful picketing without the taking of evidence or the making of findings of fact and law, the United States Court of Appeals for the District of Columbia ignored the provisions of the Norris-LaGuardia Act and decided contrary to the decisions of this Court in **New Negro Alliance v. Sanitary Grocery Co.**, 303 U. S. 552; **Milk Wagon Drivers' Union v. Lake Valley Farm Products**, 311 U. S. 91, and **United States v. Hutcheson**, 312 U. S. 219, all of which hold that it is not the function of courts to pass upon the merit or lack of merit of any labor dispute once such dispute, as defined in the Norris-LaGuardia Act, is shown to exist.

ARGUMENT

I. The Complaint Indicates that the Present Case Involves Three Labor Disputes Under the Norris-LaGuardia Act, and the Courts Below Erred in Not Dismissing the Complaint and in Permitting an Injunction Without the Taking of Testimony.

Since the complaint herein was not verified and contained none of the various allegations required under Section 7 of the Norris-LaGuardia Act, and since the trial court failed to take evidence or make findings of fact and conclusions of law as required under Sections 7 and 9 of the Norris-LaGuardia Act, it is obvious (and not denied) that the majority decision of the court below, sustaining the complaint and holding that the trial court had jurisdiction to issue the injunction against picketing without compliance with the Norris-LaGuardia Act, is erroneous if in fact the present case does involve a labor dispute within the meaning of that term as defined in Section 13 of the Norris-LaGuardia Act. See **Lauf v. Shinner**, 303 U. S. 323; **New Negro Alliance v. Sanitary Grocery Co., supra**; **Green v. Obergfell**, 121 F. (2d) 46, certiorari denied, 314 U. S. 637; **Grace Co. v. Williams**, 96 Fed. (2d) 478.

Even a cursory reading of the complaint shows the existence of not one but three labor disputes between the respondent and petitioners. Each of these disputes has been referred to briefly in the "Statement of The Case" herein, supra, p. 2. To elaborate, the complaint reveals that the respondent and petitioners are persons engaged in the same industry or having direct interests in that industry, i.e., the sale of bakery products, delivery of the product being a close and indispensable concomitant of such sale. Further, the dispute is between an employer and employees and an association of employees; the fact that the proximate relationship of employer and employees may not exist as between the respondent and the delivery driver whose

services he utilizes is immaterial in view of the proviso in Section 13(c) of the Norris-LaGuardia Act. Finally, direct injunctive relief against picketing and boycotting is sought by one person in the industry against another in the same industry. Thus, the definitions contained in subsections (a) and (b) of Section 13 are satisfied.

It remains to be determined whether the disputes over (1) time of delivery, (2) collection practices, and (3) the sale of a non-union item constitute a "controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." Act of Mar. 23, 1932, c. 90, Sec. 13, 47 Stat. 73.

(1) The dispute set forth in the complaint between respondent, who is the recipient of the deliveryman's service, and the deliveryman, who is a member of petitioner union, as to the particular hour in the day during which such member is to deliver bakery products to respondent bears a direct relationship to the conditions of such member's employment. Obviously, every customer in the city could not be supplied at one particular time of the day, and deliveries must be spaced. It is to be noted that the complaint asserts that respondent **"required"** (R. 2) the member to deliver products at an hour later than customary; were oral testimony taken as required by statute, it would have been shown that such demand had a very adverse effect upon the driver's schedule. The fact that the driver was alleged to have been replaced by another driver could not, as determined by the majority decision below, operate to end that dispute, because, if so, a similar replacement of strikers by other workers could end any labor dispute. As pointed out in the dissenting opinion of Judge Edgerton, the driver

was in the same position as a striker for the purposes of the Act and of this case, the Act making it immaterial "whether or not the disputants stand in the proximate relation of employer and employee."

(2). Likewise, the dispute between the respondent and petitioners concerning the method of payment, i.e., whether the driver should be paid for his services directly by respondent or by the bakery, included in which was the particular demand that the driver be paid a particular sum claimed to be owing him for his services, constitutes a dispute over working conditions. It is clearly of major importance to any worker performing services to determine whom he can look to each week for payment of those services. Again, were oral testimony permitted, as contemplated under the Act, it would have been shown that it is the universal practice and custom in the District of Columbia for bakery drivers to be paid directly by the bakery's customer, but that by arrangement between the driver and the plaintiff, remittance was made to Hinkle's bakery for and on behalf of the driver as a convenience to respondent. Testimony would have disclosed the true situation—which is that the driver is responsible for the commodity delivered, and the money to be paid by respondent includes the wages and commissions due the driver for the services performed by him, and that such arrangement is operative in this class of employment in the District and has been so for many years, and that respondent knew of it and agreed thereto, and the check transmitted being marked "Paid in full" was unacceptable and for that reason refused.

Involved in the dispute concerning collection practices is the demand that the driver be paid for services rendered. Certainly, if it is a labor dispute to be asked that wages be increased or that wages not be cut, it is equally a labor dispute to ask that compensation for services rendered be paid; indeed, it is a traditional function of many labor

organizations to assist their members in the collection of sums claimed to be due and owing for work performed.[2]

(3) Finally, the complaint alleges the existence of a dispute concerning the sale by plaintiff of a "certain" non-union made product. Certainly, no more traditional dispute exists than that between labor organizations and persons who assist in the process of impairing or threatening union-established working conditions by dealing with employers manufacturing or delivering products with non-union help and under non-union conditions.[3] See **Apex Hosiery Co. v. Leader**, 310 U. S. 469, wherein the Court said:

> "* * * in order to render a labor combination effective it must eliminate the competition from non-union made goods, * * *."

Indeed, the Norris-LaGuardia Act was specifically enacted

[2] See, for instance, Constitution and By-Laws, International Alliance of Theatrical Stage Employees, Article IX, p. 91:

"Section 1. Claims for Compensation.

"Any member of this Alliance to whom an employer owes a certain sum of money as compensation for services performed by the Board, which certain sum is due and unpaid, shall, if unsuccessful in his individual efforts to obtain payment, proceed to invoke the aid of the Adjustment and Claims Department in the manner hereinafter set forth."

[3] At the time of oral argument the trial Court conceded that this allegation in the complaint did allege a "labor dispute." But plaintiff had filed an affidavit in which it was alleged that plaintiff had discontinued the sale of the non-union product. On the basis of the affidavit, the District Court concluded that the labor dispute in connection with the sale by plaintiff of non-union goods had terminated. This overlooks the fact that the allegations of the complaint must determine whether a labor dispute does or does not exist, and if the complaint does reveal the existence of a labor dispute, then it is *mandatory* upon the Court, under Section 7 of the Norris-LaGuardia Act, to take oral testimony under oath and make findings of fact prior to the issuance of any restraining order or injunction. If oral testimony had revealed the fact that a labor dispute had ceased to exist (a fact which defendants deny), then the Court might properly have disregarded that fact. To do this, however, merely on the basis of affidavits is to countenance the very practice which gave rise to the Norris-LaGuardia Act. Most certainly, the complaint must in the first instance be looked to to determine whether a labor dispute exists, and thus whether the Norris-LaGuardia Act is applicable, and thereafter the Court can take testimony to establish the facts and must afford defendants opportunity for cross-examination which is specifically required by the Act. Any other rule would destroy the safeguards against the issuing of injunctions against workers and their organizations solely on the basis of affidavits.

to cure the effect of such decisions as that of the Supreme Court in **New Bedford Cut Stone Co. v. Journeymen Stone Cutters' Association,** 274 U. S. 37, in which case a refusal to work on or in connection with non-union products was held to be an unlawful strike under the Sherman Act. See **Milk Wagon Drivers' Union v. Lake Valley Farm Products, supra,** and **New Negro Alliance v. Sanitary Grocery Co., supra; Donnelly Garment Co. v. Dubinsky,** 154 Fed. (2d) 38.

Respondent contends that the dispute concerning the sale of non-union goods cannot be considered by this court because it has been rendered moot by the passage of the Taft-Hartley Act, Section 8(b) (4) (A) of which makes it an unfair labor practice for a union to require an employer not to handle or sell products of any other producer. A conclusive answer to this question, aside from the question of the constitutionality of any such unconditional prohibition of peaceful picketing (see **Bakery and Pastry Drivers and Helpers Local 802 v. Wohl,** 315 U. S. 769, and **In re. Blaney,** 13 Labor Cases, par. 64,039, decided by the Supreme Court of California October 3, 1947), is that the Taft-Hartley Act makes the remedy of injunction available only to the National Labor Relations Board and not to a private employer, so that even if the Act did apply and the constitutional issues were resolved in favor of the Act, and the particular conduct in the present case constituted a violation of the Act, still the respondent herein could not secure an injunction against such activity.

II. The Court Below Erred in Considering Whether the Labor Disputes Were Meritorious.

In the face of direct allegations indicating existence of not one but three labor disputes, and in the face of a request for an injunction against peaceful picketing by a labor organization, it is inconceivable how the trial court or the court below could determine that the safeguards of the Norris-LaGuardia Act should be disregarded and an injunction issued without the holding of hearings and the

taking of testimony. Even were the complaint ambiguous in respect to the existence of any particular labor dispute, certainly sufficient warning that the possibility of a labor dispute might exist did appear from the bare allegations of the complaint and the relief demanded to require at least that the trial court call the parties before it and hear their testimony so as to determine whether or not the type of situation envisaged by the framers of the Norris-LaGuardia Act did exist. See **Lauf v. Shinner, supra, New Negro Alliance v. Sanitary Grocery Co., supra.** Even worse than the refusal to attempt to ascertain the facts by the taking of testimony was the position taken by the court below that, even though the case might involve labor disputes, nevertheless, since such disputes were lacking in merit or were improper or were not legitimate or bona fide, an injunction could issue without observing the procedural requirements of the Norris-LaGuardia Act. Thus to substitute a court's concept of what constitutes a proper or bona fide labor dispute for the explicit statutory definition of the term as contained in the Act, can only operate, as it has operated in the present case, to bring back those very evils which it was the purpose of the Norris-LaGuardia Act to eliminate.

Among the many abuses attending the issuance of injunctions against labor organizations prior to the passage of the Norris-LaGuardia Act, the following two abuses were outstanding: (1) The practice of granting injunctions **ex parte** and on the basis of pleadings or affidavits without the hearing of witnesses or opportunity for cross-examination. See Frankfurter & Greene, "The Labor Injunction," pp. 24-60; 68-81, and Minority Report of Senator Norris, 71st Congress, Calendar No. 884, Report 1060, Part 2, p. 19. (2) The practice of granting injunctions based on the concept of individual judges as to whether any particular dispute was legitimate, praiseworthy, bona fide or otherwise proper, rather than to leave the determination of such matters to the legislative branch of the government. See Frank-

furter & Greene, "The Labor Injunction," pp. 60-66; Minority Report of Senator Norris, **supra**, pp. 11; 15-16.[4]

It was the express purpose of the Norris-LaGuardia Act to prevent these practices. If the decision of the majority of the court below constitutes good law, that purpose can, with ease, be frustrated and perverted. That the majority decision below does not constitute good law is obvious not only from a study of the purposes and objectives of the Norris-LaGuardia Act and a regard for its literal language, but also from the determination of this Honorable Court in the cases of **New Negro Alliance v. Sanitary Grocery Co., supra; Milk Wagon Drivers' Union v. Lake Valley Farm Products, supra,** and **United States v. Hutcheson, supra.** These decisions made clear that the Norris-LaGuardia Act precluded judicial inquiry into the propriety or merits of any labor dispute once a dispute as defined in the Norris-LaGuardia Act was shown to exist.

In the **New Negro Alliance** case, this Court held that:

> "The Act does not concern itself with the background or the motives of the dispute. . . . The legislative history of the Act demonstrates that it was the purpose of the Congress further to extend the prohibitions of the Clayton Act respecting the exercise of

---

[4] The report states in this connection as follows:

"It is amazing to realize that in the last 40 years there has developed in the American courts the practice of writing a special law to fit the individual case by judges in issuing labor injunctions; and that thereupon the judge, who himself wrote the law, has undertaken to prescribe the penalty for its violation and to punish the violator without permitting the accused to enjoy a trial by jury or even to insist upon a trial before another judge. It cannot be successfully claimed that the courts have not written into these injunction cases a new law of labor disputes, fitting the law to each particular case and then enforcing this new law made by the court . . . It is difficult to see how any civilized people could indefinitely submit to such tyrannical procedure. It is not difficult to understand how such cruel laws, made not by any legislature but by a judge upon the bench, should bring our Federal courts into disrepute. Neither is it difficult to see how such injunctions, violating the conscience of civilization, should frighten persons against whom such injunctions are issued into desperation. What free American citizen is willing to submit to the violation of his sacred rights of human liberty and freedom?"

jurisdiction by federal courts and to obviate the results of the judicial construction of that Act. It was intended that peaceful and orderly dissemination of information by those defined as persons interested in a labor dispute concerning "terms and conditions of employment" in an industry or a plant or a place of business should be lawful; that, short of fraud, breach of the peace, violence, or conduct otherwise unlawful, those having a direct or indirect interest in such terms and conditions of employment should be at liberty to advertise and disseminate facts and information with respect to terms and conditions of employment, and peacefully to persuade others to concur in their views respecting an employer's practices."

In the **Milk Wagon Drivers' Union** case this Court held that:

"Whether rightly or wrongly, the defendant union believed that the 'vendor system' was a scheme or device utilized for the purpose of escaping the payment of union wages and the assumption of working conditions commensurate with those imposed under union standards. **To say, as the Circuit Court of Appeals did, that the conflict here is not a good faith labor issue, and that therefore there is no 'labor dispute,' is to ignore the statutory definition of the term**; to say, further, that the conditioned abandonment of the vendor system, under the circumstances, was an issue unrelated to labor's efforts to improve working conditions, is to shut one's eyes to the everyday elements of industrial strife. (Emphasis supplied.)

In the **Hutcheson** case this Court held in respect to Section 20 of the Clayton Act (of which the Norris-LaGuardia Act is a narrowing extension, **United States v. United Mine Workers**, decided March 6, 1947) that

". . . So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under Sec. 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness

of the end of which the particular union activities are the means."

The Court further held in that same case, in respect to the Norris-LaGuardia Act, as follows:

"... But we need not determine whether the conduct is legal within the restrictions which **Duplex Co. v. Deering** gave to the immunities of Sec. 20 of the Clayton Act. Congress in the Norris-LaGuardia Act has expressed the public policy of the United States and defined its conception of a 'labor dispute' in terms that no longer leave room for doubt."

In thus ignoring the plain language of the Norris-LaGuardia Act in utter disregard of its essential purpose and objectives, and in disregarding applicable decisions of this Court upon the very point in issue, it is respectfully submitted that the Court of Appeals for the District of Columbia has committed grievous error requiring amendment by this Court. The decision below, if allowed to stand, would operate as strong precedent for return to the era of judicial rather than legislative determination of the merits of labor controversies, an era supposedly closed by the Norris-LaGuardia Act as a matter of national policy.

CONCLUSION

Petitioners, therefore, contend for the reasons above set forth that the judgment of the United States Court of Appeals for the District of Columbia should be reversed, the injunction be withdrawn, and the complaint herein be dismissed.

Respectfully submitted,

J. Albert Woll,
Herbert S. Thatcher,
Jacqueline Wemple,
736 Bowen Building,
Washington 5, D. C.,
Counsel for Petitioners.

APPENDIX A

UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA

No. 9121

BAKER SALES DRIVERS LOCAL UNION No. 33, an Unincorporated Association, and CHARLES M. ANDRE, *Appellants*,

v.

A. WAGSHAL, Trading as "Wagshal's Delicatessen," *Appellee*

Appeal from the District Court of the United States for the District of Columbia

Decided April 28, 1947

Mr. Herbert S. Thatcher, with whom Mr. Joseph A. Padway and Miss Jacqueline Wemple were on the brief, for appellants.

Mr. William E. Leahy, with whom Mr. Nicholas J. Chase was on the brief, for appellee.

Before Edgerton, and Clark and Wilbur K. Miller, JJ.

CLARK, *J.*:

Technically, this cause is before us on an appeal from an order of the District Court overruling appellants' Motion to Dismiss and an order of the District Court granting an injunction pendente lite against appellants. Appellants' petition for allowance of a special appeal from the same orders, filed subsequent to the filing of the Notice of Appeal of right, was denied by this Court at the October term, 1945. Appellee moved to dismiss the appeal on the ground that neither order is a final order appealable to this Court. Appellants answered this motion to dismiss by alleging that the cause involved a "labor dispute" and was appealable as a matter of statutory right under the Norris-LaGuardia Act. This Court at the April term, 1946, ordered that the case be placed on the summary docket and set for argument on the single question as to whether the case involves a labor dispute under the terms of the Norris-LaGuardia Act. That, therefore, is the only question now to be considered by this Court.

This litigation arises out of these facts. Appellee here, plaintiff below, is the owner and operator of a delicatessen. Appellants, defendants below, are a local union organization of bakery drivers, as well as the Union's business agent. Appellee had been for a number of years the purchaser of a considerable quantity of bakery products from Hinkle's Bakery, delivered by a Union driver, who, it is undisputed, was an employee of Hinkle and not of appellee. For some time prior to July 5th, 1945, the Union driver had been making deliveries to appellee at the noon hour.

This schedule was unsatisfactory to appellee because a luncheon business was operated in conjunction with the delicatessen and at this hour it was inconvenient, if not impossible, for appellee to check the bakery delivery with the driver. Appellee requested delivery at a later hour. Thereafter, Hinkle's Bakery advised appellee that the driver would make no further deliveries to her establishment and that the bakery could make and furnish appellee with no more bakery supplies. Appellee then turned to other sources for supplies and secured another connection on terms mutually agreeable to both parties.

It is undisputed that throughout the relationship between Hinkle and appellee, appellee had been consistently in the habit of paying all accounts directly to Hinkle.

On July 26, 1945, business agent Andre, representing the Union, appeared at appellee's place of business and stated that $150 was due and owing to the bakery driver who had refused further deliveries. Demand for immediate payment was made. Appellee's manager countered with the claim that he did not owe the driver anything since his practice had always been to pay directly to the bakery.

On this visit the Union representative demanded that payment be made to the driver, and also told appellee that he should immediately stop selling a certain non-Union made item that he observed in appellee's establishment. The latter portion of the demand was complied with by appellee and the sale of the non-Union item was discontinued. Appellee's manager was told that if he did not comply with all of these demands the drivers' Union would stop all shipments of bakery, milk and dairy products coming to his store from any source, even by Railway Express from outside of the District of Columbia. Shortly thereafter appellee made payment, by check, to the bakery, conformable to her contractual relationship with the bakery and as had always been her practice. The check was returned by the Union representative with a letter which

stated that it could not be accepted in settlement because "it was $12.22 short of the amount which is owned (sic) to our member, Leon Wolf."

On July 27, 1945, the New Philadelphia bakery which had been delivering bakery products to appellee, notified appellee that no more deliveries could be made inasmuch as appellant Union had threatened to pull out all of its drivers if any products of any sort were sold or delivered to appellee.

Sometime late in July, 1945, the drivers' Union set up a boycott against appellee which was successful in keeping appellee from purchasing bread either from bakers or retail stores in Washington or surrounding territory, even to the extent of a single loaf of broad. In addition to the boycott, aimed at shutting off the necessary food supplies, appellee's business was picketed by defendant Andre personally and by others and it was generally stated by the Union that appellee was involved in a "labor dispute" with the Union.

In addition to the undoubtedly effective boycott as to bakery products, plaintiff's complaint alleged (and it must be taken to be admitted by the defendants' motion to dismiss) that the defendants had also threatened to prohibit in like manner all deliveries and sales of milk and dairy products to be made to plaintiff, which, if not enjoined, would compel plaintiff to discontinue business to her irreparable damage.

On these essential facts appellee brought a complaint in the lower court asking that the Union be restrained pendente lite and permanently from boycotting and interfering with her business, and from publishing false statements. In addition to the injunctive relief requested, damages in the amount of $50,000 were asked, along with an equal amount of punitive damages. After hearing extensive argument and considering affidavits, the trial court overruled appellants' motion to dismiss and granted appellee's petition for an injunction pending trial.

Under this court's order, as noted supra, the single question before us now is: Does the complaint show the existence of a "labor dispute" as the term is defined in the Norris-LaGuardia Act.[1]

If the question is to be answered in the affirmative, it seems clear that the temporary injunction was erroneously granted, for the

[1] 29 U. S. C. 101.

standards prescribed by Section 7 and 9 of the Act as necessary to the issuance of injunctive relief were not met.[2]

In our opinion the facts of the instant case are so different from those in the two leading cases in this court cited and relied upon by appellants, as to take the case clearly outside those decisions.[3] In those cases exacting consideration was given to the underlying principles which support the Norris-LaGuardia Act, and we are not disposed to modify or repudiate the policy fundamentals expressed in those opinions. We are here concerned with the specific problem of determining whether the trial court was correct in its judgment that on the facts before it no "labor dispute" within the terms of the Act, and the decisions under it, was made out.

In the first place appellants appear to urge that the mere fact that the complaint was directed toward a union, by a commercial

---

[2] Section 7 reads in pertinent part: "No Court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in sections 1-15 of this title, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court to the effect—

"(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued, on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

"(b) That substantial and irreparable injury to complainant's property will follow;

"(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

"(d) That complainant has no adequate remedy at law; and

"(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection."

Section 9 provides: "No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and shall be expressly included in said findings of fact made and filed by the court as provided in sections 1-15 of this title. Mar. 23, 1932, c. 90, Sec. 9, 47 Stat. 72."

[3] Green v. Obergfell, 73 App. D. C. 300, 121 F. (2d) 46, cert. denied, 314 U. S. 637; Fur Workers Union, Local No. 72 v. Fur Workers Union No. 21238, 70 App. D. C. 122, 105 F. (2d) 1, aff'd 308 U. S. 522.

concern which admittedly had some contact but no contractual relations with union members, is sufficient to subject the controversy to the interdiction of the Act. This argument, we think, goes substantially beyond the points decided, and the interpretations established in precedent cases. It is an unwarranted advance from the terms of the statute and the judicial interpretations stating that the proximate relationship of employer and employee need not exist in order that there be shown a labor dispute within the meaning of the law. See *Lauf* v. *Shinner*, 303 U. S. 323; *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552. If we were to accept appellants' argument on this point we would be providing a basis whereby even the most remote and casual association with a union employee, which resulted in disagreement, would be classed a "labor dispute." The protection of labor in its broad programs of organization, and in its specific efforts to advance the individual and collective well being of its membership does not require that we open the way, through interpretative expansion of the concept of "labor dispute," to unbridled attacks upon commercial interests which may by chance or misadventure brush a union or a union member. As appears from the decided cases, the courts have been most liberal in holding that wherever the facts show a bona fide labor controversy, founded upon genuine issues involving the protection of labor in pursuing its legitimate objectives, the Norris-LaGuardia Act is an effective bar to injunctive relief . . . even where the employer may in effect be an innocent bystander. It does not follow from this that, where the facts do not support the assertion that there is in *fact* a dispute, the union should have the benefit of the doubt, as against the interest in protecting the rights of private property owners whose business may be jeopardized by labor's antagonism.

The Norris-LaGuardia Act was passed to correct certain great abuses by management in the use of the injunctive process during the earlier struggles of the trades unions to gain economic and social rights for their membership. It was obviously intended by Congress to be a highly remedial Act and as such is to be liberally construed by the courts. And, indeed, it has been construed with the most extreme liberality to such a degree that it might be said with some justice that there have been extensions of the purposes of the Act not by legislative enactment but by judicial legislation. Be that as it may, no court so far as we are advised or have been able to find has ever gone so far in extending and defining the Act as to apply it to a situation where the business agent of a union, having no contractual relations whatever with the proprietor of any business, takes it upon himself to act as the volunteer collection agent for a third party and attempts by threats, picketing and boycott to ruin a legitimate business over a difference of $12.20 between

original parties to a transaction to which the business agent was an intruder and which should have been determined in the Small Claims Branch of the Municipal Court. To maintain that such gratuitous interference on the part of defendant Andre constitutes a "labor dispute" within the careful definitions of the Norris-LaGuardia Act is ridiculous.

As in all cases where two readily acceptable basic policies collide, it is the court's function to weigh and balance the conflicting interests.[4] Here we have the interests of labor under its protective shield of the anti-injunction legislation to measure against the interests and rights of the appellee. Viewing the problem in the light of facts before the trial court, we think the result which was reached is correct.

Turning to the specific items alleged as constituting a labor dispute we find that the first relied upon is a matter of delivery hours. The appellee admittedly objected to taking delivery at the time the particular driver involved desired or, because of route restrictions, had to make delivery. The question here is whether this amounts to a controversy concerning the "hours of employment." Here appellee asked for a more favorable delivery time, but when told that this driver could not or would not make delivery at any other time, the matter was dropped, and appellee turned to another bakery (also served by union drivers) for supplies. From this situation we fail to perceive how a "dispute" may be said to exist. It cannot create a dispute for a tradesman to accede to the demands of the adversary, and to attempt to conduct a business notwithstanding disadvantages may be suffered by the tradesman.

As for the alleged controversy regarding the money due to the driver, it does not anywhere appear that there was any obligation running from appellee to the driver or to the union. The purchases of bakery products were made from the bakery, and payment was sent to the bakery. So far as appellee was concerned any payment to the driver was a matter between the bakery and the driver, as its employee. This arrangement cannot, in our judgment, be tortured into a dispute as to "wages."

To suggest, as appellants do in their brief, that an employee of an independent contractor (The Hinkle Bakery occupied no relationship to appellee save that of seller and buyer) who, for reasons of his own, refused to continue delivery on behalf of his own employer and induced the employer (Hinkle) to discontinue sales is "a striker," and further to suggest that for appellee to attempt to obtain his bakery supplies from other independent

[4] See particularly Allen Bradley Co. v. Local Union No. 3, 325 U. S. 797, where Labor's protective legislation was held not to shield the union from the provisions of the Sherman Act.

sellers is to replace a striker with another laborer, is reductio ad absurdum.

Equally untenable is the theory that because defendant Andre is the business agent of a union and chooses to turn himself into a volunteer collection agent for the Hinkle Bakery he thereby creates a labor dispute within the meaning of the Norris-LaGuardia Act.

There is the further item concerning the non-union product found in appellee's establishment by the union agent. As to this it appears from affidavits in the record that upon receiving the demand to discontinue selling this non-union item, it was eliminated from the products offered for sale by appellee. Appellant contends that appellee cannot rely upon the affidavits in question because the Act proscribes their use. We think the appellee's response to the contention represents the correct view. The question for determination was a preliminary one to be decided in terms of the trial court's general equitable jurisdiction. To determine whether that jurisdiction existed in the face of the Norris-LaGuardia Act, the court properly took into account the affidavits before it.

There being, in our opinion, no bona fide "labor dispute," we do not think that in the present situation the terms of the injunction require modification.[5]

Appeal dismissed.

EDGERTON, *J., dissenting:*

It seems to me clear that this is a "case involving or growing out of a labor dispute." The Norris-LaGuardia Act forbids injunctions in such cases unless specified requirements are met. These requirements include (1) a complaint under oath; (2) testimony taken in open court; and (3) "findings of fact by the court, to the effect—(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained . . .; (b) That substantial and irreparable injury to complainant's property will follow: (c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief; (d) That complainant has no adequate remedy at law; and (e) That the public officers are charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection."[1] In this case the complaint was

[5] 5. *Cf.* the underlying fact situation in Thornhill v. Alabama, 310 U. S. 88.

[1] 47 Stat. 71, § 7, 29 U. S. C. § 107. *Cf.* footnote 2 of the opinion of the court.

not under oath, no testimony was taken in open court, and no facts were found. It is not even contended that the facts required by the Act existed.

The court states that appellee "requested" delivery at a later hour. Appellee's complaint states that the driver was "required" to deliver at a later hour. Appellee would not take delivery at the old hour and the driver would not make delivery at a new hour. Since the Act makes it immaterial "whether or not the disputants stand in the proximate relation of employer and employee," this dispute concerning the time when the driver's work should be done was as plainly a labor dispute as if it had concerned the introduction of a night shift in a factory. Afterwards a dispute arose over appellee's alleged sale of non-union goods. This also was a familiar type of labor dispute. It is immaterial whether the dispute over the driver's money claim was or was not a labor dispute. One labor dispute brings the Norris-LaGuardia Act into operation. Here there were at least two. Since the boycotting, picketing and other conduct of which appellee complains grew out of these disputes, this is a "case involving or growing out of a labor dispute."

The court takes the somewhat paradoxical position that the disputes regarding working hours and non-union goods were not labor disputes. Its theory is that there is no labor dispute unless the court thinks the interests the defendants seek to promote are "legitimate" and are more important, on balance, than the conflicting interests of the plaintiffs. The court identifies the statutory term "labor dispute" with the court's concept of a "bona fide labor controversy, founded upon genuine issues involving the protection of labor in pursuing its legitimate objectives." But the Act says nothing about the legitimacy of objectives or the balancing of conflicting interests. The Supreme Court has overruled this court's theory in these words: "To say, as the Circuit Court of Appeals did, that the conflict here is not a good faith labor issue, and that therefore there is no 'labor dispute,' is to ignore the statutory definition of the term . . ."[2] That definition is: "The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiation, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." [3] The rights and wrongs of the disputes and of the conduct growing out of them, as to which I

[2] *Milk Wagon Drivers' Union, Local No. 753* v. *Lake Valley Farm Products, Inc.*, 311 U. S. 91, 99.

[3] 47 Stat. 73 § 13(c), 29 U. S. C. § 113(c).

express no opinion,[4] have nothing to do with the question whether this is a "case involving or growing out of a labor dispute."

The court's ruling comes to this, that the Act has no application to labor activity which a court thinks illegal or improper. But the Act has no practical application to anything else, for courts have never enjoined labor activity which they thought legal and proper. Therefore the court's ruling not only conflicts with the Act but nullifies it. The Act was passed for the very purpose of preventing courts, except in the extraordinary circumstances specified in the Act, from issuing injunctions against labor activity which they thought illegal or improper. There is no finding and no contention that those extraordinary circumstances were present here.

The court holds also, in effect, that to replace a striker with another worker is to "accede to the demands" of the striker,[5] ends any dispute, and prevents further activity on his behalf from growing out of a dispute.

---

[4] Except that the peaceful picketing which the District Court enjoined was within appellants' rights under the Constitution. *Thornhill v. Alabama*, 310 U. S. 88; *Bakery and Pastry Drivers and Helpers Local 802 v. Wohl*, 315 U. S. 769.

[5] It may be that the driver was not technically a striker, since he did not stop working for his immediate employer Hinkle's Bakery. But he is in the same position as a striker for the purposes of the Act and of this case, since the Act makes it immaterial "whether or not the disputants stand in the proximate relation of employer and employee."

APPENDIX B

On the question of whether plaintiff failed to make certain necessary allegations, and whether the Court failed to observe various procedural requirements in issuing the temporary injunction, the following sections of the Act are applicable:

"Section 7. No Court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in sections 1-15 of this title, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued, on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

"Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to co...plainant's property will be unavoidable, such a tem-

porary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court. Mar. 23, 1932, c. 90, Sec. 7, 47 Stat. 71."

"Section 8. No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration. Mar. 23, 1932, c. 90, Sec. 8, 47 Stat. 72."

"Section 9. No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided in sections 1-15 of this title. Mar. 23, 1932, c. 90, Sec. 9, 47 Stat. 72."

On the question of whether a labor dispute exists, making the Norris-LaGuardia Act applicable, the following section is relevant:

"Section 13. When used in sections 1-15 of this title and for the purposes of such sections—(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are

members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in this section) of 'persons participating or interested' therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee. Mar. 23, 1932, c. 90, Sec. 13, 47 Stat. 73."

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 225

BAKERY SALES DRIVERS LOCAL UNION NO. 33, An Unincorporated Association, and CHARLES M. ANDRE, *Petitioners,*

v.

A. WAGSHAL, Trading as "Wagshal's Delicatessen," *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

REPLY BRIEF OF PETITIONERS

J. ALBERT WOLL,
HERBERT S. THATCHER,
JACQUELINE WEMPLE,
736 Bowen Building,
Washington 5, D. C.
Counsel for Petitioners.

Press of Ransdell Inc., Washington, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 225

BAKERY SALES DRIVERS LOCAL UNION No. 33, An Unincorporated Association, and CHARLES M. ANDRE, *Petitioners*,

v.

A. WAGSHAL, Trading as "Wagshal's Delicatessen," *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

REPLY BRIEF OF PETITIONERS

In accord with permission given by the Chief Justice at the time of oral argument, petitioners herewith file their Reply Brief. The principal brief adequately discusses the question of whether the complaint indicates the existing labor dispute in respect to (1) time of delivery, and (2) sale of non-union goods. This reply is limited to a question of whether, under the allegations of paragraph 4 of the complaint, a labor dispute exists as to method and time of payment. Respondents argue strongly that the complaint on its face (and to which petitioners must be confined in their argument) indicates that the driver, member of petitioner

union, had at no time previous to the demands of July 26, 1945, had dealings directly with the respondent delicatessen, and that the payments or account had always been between the delicatessen and the bakery. Respondent contends, therefore, that the union demand for immediate payment by the delicatessen, rather than by the bakery, was purely the demand of an interloper disconnected with and unrelated to any labor dispute. The answer to that contention is as follows:

In the first place, the complaint on its face shows that the driver was no mere interloper, because the complaint alleges that the driver had, for a number of years at least, been delivering bakery products to the delicatessen and thus was performing a very definite service for the delicatessen. Furthermore, there is no indication (and it is not the fact) that there was any extortion of a sum of money involved in the demand or that the delicatessen was being required to pay double for the services, respondent not having already paid the bakery.

The complaint does indicate that the driver is engaged in the same industry as the respondent delicatessen. This fact would answer the contention that a newsboy or other person delivering to or performing services for an ultimate private consumer could create a labor dispute by making some demand respecting payment of wages or time of delivery. The ultimate consumer is not a person engaged in any industry, trade or occupation similar to that of the person performing the service.

What, then, is the precise labor dispute as indicated by the allegations in paragraph 4 of the complaint? That dispute involves an attempt by the union in question to impose upon the delicatessen the relationship of employer at least as to certain elements of the employer-employee relationship, namely, (1) the payment by the delicatessen rather than by the bakery of the sum due for services rendered and products delivered, and (2) the time of payment for such services, i.e., payment to be made immediately upon

delivery rather than waiting for accounts to be settled as between the delicatessen and the bakery. This petitioners assert this to be a controversy concerning the "association or representation of persons . . . *seeking to arrange* terms or conditions of employment," as set forth in Section 13(c) of the Norris-LaGuardia Act. The petitioner union, on the face of the complaint, is seeking to create a dual employer relationship whereunder some of the ordinary incidents of employment are dealt with by the bakery as the driver's principal employer and other incidents determined by the delicatessen as a partial employer. Nothing in the Norris-LaGuardia Act prevents persons in an industry from attempting to create employment relationships, dual or otherwise; on the contrary, in the *New Negro Alliance* case (*New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552) the organization in question was attempting to *create* an entirely new employment relationship regardless of the fact that the employer in question had had no previous dealings with the association and did not want to have any dealings or employment relationships with the members of the association. Similarly, drivers in the *Lake Valley Farms Products* case (*Milk Wagon Drivers' Union* v. *Lake Valley Farm Products*, 311 U. S. 91) were seeking to *create* an employment relationship by changing from the status of independent contractors to that of employer and employees. In the *Wohl* case (*Bakery & Pastry Drivers & Helpers* v. *Wohl*, 315 U. S. 769) the drivers were attempting to *create* an employment relationship by requiring the hiring of additional employees. The attempt here, as evidenced by the complaint, is to require the delicatessen to assume at least one important element of the employment relationship, namely, the payment for services by the delicatessen rather than by the bakery. Furthermore, the dispute involved the question of immediacy of payments. As alleged in the complaint, the demand was that the driver be paid "*immediately*" and without waiting for payments "in the regular course and upon adjustments made." Certainly, it cannot

be denied that the question of time of payment, the question of avoiding delays in payment, or awaiting adjustments of differences between the delicatessen and the bakery is an important term or condition of employment. Similarly, it is obviously an important term or condition of employment to determine just whom the drivers are to look to for payment for services rendered.

Petitioners contend that not one but three distinct labor disputes are clearly set forth in the complaint, namely, (1) time of delivery; (2) person by whom the driver is to be paid for services and the time or immediacy of payment, and (3) sale of non-union goods; and any one is sufficient to bring the Norris-LaGuardia Act into play. Compare the factual situation in *Hunt* v. *Crumboch*, 325 U. S. 821, where this Court held that a concerted course of activity by a labor organization against an employer with whom it had no employment relationships and desired none, resulting in driving the employer out of business, was protected activity under the Sherman Act as narrowed by the Norris-LaGuardia Act.

It is petitioners' final contention that, unless the allegations of a complaint seeking an injunction against peaceful picketing and other types of labor activities declared non-enjoinable under the Norris-LaGuardia Act except under certain circumstances, clearly negatives on its face any possibility that a labor dispute exists (assuming, however, that the complaint is strictly construed in favor of the complaint), the procedural safeguards of the Norris-LaGuardia Act should be observed and testimony taken, with opportunity for cross-examination, so that the true facts can be ascertained. Any other rule would permit such peaceful labor activities sanctioned not only under the Norris-LaGuardia, Clayton and Sherman Acts, but also sanctified as a concomitant of the civil rights of speech and assembly, to be enjoined upon the allegations of a complaint cleverly framed to avoid the restrictions of the Norris-LaGuardia Act. Certainly, where, as in the present case,

employees in the same industry as the complainant are being threatened with an injunction against such peaceful, concerted labor activities, and where there is ample indication at least of the possibility of a labor dispute, and the complaint strictly construed does not negative any such possibility, then the District Courts should be required to bring witnesses before it and determine the facts on the basis of the sworn testimony.

Respectfully submitted,

J. ALBERT WOLL,
HERBERT S. THATCHER,
JACQUELINE WEMPLE,
736 Bowen Building,
Washington 5, D. C.
Counsel for Petitioners.

FILE COPY

Office - Supreme Court, U. S.
FILED
SEP 3 1947
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 225

BAKERY SALES DRIVERS LOCAL UNION NO. 33, An Unincorporated Association, and CHARLES M. ANDRE,

Petitioners,

vs.

A. WAGSHAL, Trading as "WAGSHAL'S DELICATESSEN,"

Respondent

STATEMENT OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM E. LEAHY,
821 15th Street, N. W.,
Washington, D. C.;
IRVING WILNER,
Bond Building,
Washington, D. C.,
Counsel for Respondent.

INDEX

Subject Index

	Page
The question presented in the petition herein is a moot one	2
No error committed by the court below	4
Prayer	7

Table of Cases Cited

Aetna Life Insurance Co. v. *Haworth*, 300 U. S. 227, 81 L. Ed. 617, 108 A. L. R. 1000	2
American Steel Foundries v. *Tri-City Central Trades Council*, 257 U. S. 184, 66 L. Ed. 189, 27 A. L. R. 360	4
Ashwander v. *Tennessee Valley Authority*, 297 U. S. 288, 80 L. Ed. 688	3
Carpenter v. *Wabash Ry. Co.*, 309 U. S. 23, 84 L. Ed. 558	2
Columbia River Packers Association, Inc. v. *Hinton*, 315 U. S. 143, 86 L. Ed. 750	5
Converse v. *Highway Construction Co.*, 107 F. (2d) 127, 127 A. L. R. 869	6
Milk Wagon Drivers Union v. *Lake Valley Farm Products*, 311 U. S. 91, 85 L. Ed. 63	5
New Negro Alliance v. *Sanitary Grocery Co.*, 303 U. S. 552, 82 L. Ed. 1012	5
Pennsylvania v. *Wheeling, etc.*, 59 U. S. 421, 15 L. Ed. 435	4
Public Utilities Comm'n v. *United Fuel Gas Co.*, 317 U. S. 456, 87 L. Ed. 396	2
Robinson v. *Robins Dry Dock & Repair Co.*, 238 N. Y. 271, 144 N. E. 597, 36 A. L. R. 1310	4
St. Pierre v. *United States*, 319 U. S. 41, 87 L. Ed. 1199	3
Texas Co. v. *Brown*, 258 U. S. 466, 66 L. Ed. 721	4
United States v. *Hutcheson*, 212 U. S. 219	6
Western Union Telegraph Co. v. *International Brotherhood*, 133 F. (2d) 955	4

Statutes Cited

	Page
Constitution of the United States, Art. III, Section 2	2
National Labor Relations Act as amended by the Labor Management Relations Act of June 23, 1947 (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Secs. 151-166, Pub. No. 198, 74th Cong., as amended by Act of June 23, 1947, Pub. Law 101, 80th Cong.)	3

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 225

BAKERY SALES DRIVERS LOCAL UNION NO. 33, An Unincorporated Association, and CHARLES M. ANDRE,

Petitioners,

vs.

A. WAGSHAL, Trading as "WAGSHAL'S DELICATESSEN,"

Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable the Justices of the Supreme Court of the United States:

The above named respondent respectfully submits that the petition for a writ of certiorari heretofore prayed for in this cause be denied. In urging the denial of said petition, respondent relies on the following grounds:

1. This Court should not entertain this petition for the reason that the questions therein presented are moot.

2. The Court below committed no error in affirming the decision of the District Court of the United States for the District of Columbia, overruling petitioners' motion to dismiss a complaint for injunction filed by respondent, and granting an injunction *pendente lite* against picketing and boycotting by petitioners. (Opinion of the United States Court of Appeals for the District of Columbia, No. 9121; Appendix A in the petition of the appellants.)

The Question Presented in the Petition Herein Is a Moot One

An appeal in an equity suit opens up the inquiry as to the correctness of the decision appealed from and its reversibility as of the time of the ultimate decision by the reviewing tribunal. *Public Utilities Commission of Ohio* v. *United Fuel Gas Co.*, 317 U. S. 456, 87 L. Ed. 396; *Carpenter* v. *Wabash Ry. Co.*, 309 U. S. 23, 84 L. Ed. 558.

By Art. III Section 2 of the U. S. Constitution, the Judicial power of the United States is limited to cases and controversies. In *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227, 81 L. Ed. 617, 108 A. L. R. 1000, this Court stated that a controversy, within the purview of the Constitution is such "that it must be a real and substantial controversy *admitting of specific relief through a decree of a specific character*, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."

As far as the operation of the injunction herein, *pendente lite*, between the date of its rendition and the date of the ultimate disposition of the petition for the writ of certiorari in this cause is concerned, it cannot, as a practical matter, be affected by the action of this Court. Petitioners herein do not allege or claim any damages attributable to the effectiveness of the temporary injunction in the interim between the aforestated dates. To this extent, therefore, the petition

herein praying for a review of the judgment of the United States Court of Appeals for the District of Columbia entered in this cause April 28, 1947, presents nothing but a moot question pertaining to no existing controversy. Such a moot question, the United States Courts, including this Court, are without constitutional power to adjudicate. *St. Pierre* v. *U. S.*, 319 U. S. 41, 87 L. Ed. 1199 (1943) and cases there cited; *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 80 L. Ed. 688, rehearing denied—297 U. S. 728, 80 L. Ed. 1011.

Insofar as the prospective operation of the injunction *pendente lite* in this cause is concerned, the question as to whether it continues to be valid for the purpose of restraining picketing and boycotting by the petitioners is likewise moot. This for the reason that the National Labor Relations Act as amended by the Labor Management Relations Act of June 23, 1947 Act of July 5, 1935 c. 372, 49 Stat. 449, 29 U. S. C. Sec. 151-166, Pub. No. 198, 74th Cong., as amended by Act of June 23, 1947, Pub. Law 101, 80th Cong.), effective August 23, 1947, in Sec. 8 (b) (4) (A), renders it a Union Unfair Labor Practice for a Union to require an employer not to handle or sell products of any other producer, processor or manufacturer, and provides further, in Sec. 10 (h) thereof that Courts not be limited in granting relief in enforcing orders of the Board, pursuant to Sec. (9) of that Act giving the Board power to enforce the provisions of Sec. (8), by the provisions of the Norris-LaGuardia Act. To the extent, therefore, that petitioners allege a "dispute" between them and the respondent concerning a sale by the latter of a certain non-union product as a ground for bringing this cause within the anti-injunction provisions of the Norris-LaGuardia Act, such a dispute can no longer, by virtue of the express provisions of the New Labor Management Relations Act of 1947, be treated as a labor dispute

rendering the United States District Court powerless to issue injunctive process.

Statutes passed subsequent to the date that the decree below was rendered, must be given effect in deciding an appeal where the case involved relief by injunction which operate only *in futuro*. *Texas Co.* v. *Brown*, 258 U. S. 466, 66, L. Ed. 721; *Pennsylvania* v. *Wheeling etc.*, 59 U. S. 421, 15 L. Ed. 435; *Robinson* v. *Robins Dry Dock & Repair Co.*, 238 N. Y. 271, 144 N. E. 597, 36 A. L. R. 1310, error dismissed, 271 U. S. 649, 70 L. Ed. 1131. This principle has found recognition in labor cases. In *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, 66 L. Ed. 189, 27 A. L. R. 360, this Court held that the determination of an appeal of right to enjoin picketing must be made in view of a Statute which took effect while the case was pending. To same effect: *Western Union Telegraph Co.* v. *International Brotherhood, etc.*, 133 F. 2d. 955, at 958 (c.c.a. 7, 1943).

No Error Committed by the Court Below

1. The Court below properly held that the alleged dispute over the time of delivery of bakery products was not a labor dispute within the Norris-LaGuardia Act. Paragraph 3 of the complaint filed in the District Court of the United States for the District of Columbia by respondent herein (cited by petitioners on page 3 of its petition for the writ of certiorari) shows on its face that it had been resolved prior to the instituting by the petitioners of the picketing and boycotting which were the subject of the complaint before the Trial Court. This fact must be taken as admitted by petitioners in view of its motion to dismiss the complaint, as was properly pointed out by the United States Court of Appeals for the District of Columbia, in its opinion (page 16 of the petition for the writ of certiorari).

2. Petitioners' contention that the dispute between the Union and respondent herein concerning an alleged underpayment of $12.20 by respondent on account of bakery products sold to him by a certain bakery amounted to a labor dispute is, to use the expression of the United States Court of Appeals, in its opinion rendered in this cause, ridiculous. Aside from the cogent and convincing arguments advanced by the Court of Appeals in support of its decision on this particular, it may be added that the conclusion of the United States Court of Appeals that this dispute is outside the definition of labor disputes and controversies within the meaning of the Norris-LaGuardia Act, is entirely supported by the decision of this Court in the case of *Columbia River Packers Association Inc.* v. *Hinton*, 315 U. S. 143, 86 L. Ed. 750 (1941). In that case this Court specifically stated "that a dispute among business men over the terms of a contract for the sale of fish is something different from a controversy concerning terms and conditions of employment, or concerning the association . . . of persons . . . seeking to arrange terms or conditions of employment calls for no extended discussion. The definition and stated public policy of the act . . . make it clear that the attention of Congress was focused upon disputes affecting the employer-employee relationship, and that the act was not intended to have application to disputes over the sale of commodities." Further, in view of the reliance which petitioners place upon the cases, *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552, 82 L. Ed. 1012, and *Milk Wagon Drivers Union* v. *Lake Valley Farm Products*, 311 U. S. 91, 85 L. Ed. 63, it is appropriate to point out that these two last cited cases have been specifically distinguished by this Court from the facts in the case of *Columbia River Packers Association Inc.* v. *Hinton*, by the statement that in those cases "the employer-employee rela-

tionship was the matrix of the controversy." In the case at Bar, the money which was the subject of the dispute was not owed as wages but as the purchase price of merchandise; it was not owed to the Union (petitioners herein) but to their employer, an independent producer. Acting as volunteer collectors for the producer of the bakery products of his accounts, the dispute concerning the correctness of the amount tendered by the respondent cannot be treated as a labor dispute for the additional reason that, in this respect there was a combination between the Union with a non-labor individual within the analysis in the case of *U. S.* v. *Hutcheson*, 212 U. S. 219.

3. The dispute as to the alleged sale by respondent of a non-union product, should not be treated as a labor dispute within the meaning of the definition in the Norris-LaGuardia Act. There was nothing in the proceedings before the United States District Court for the District of Columbia to show that such a "dispute" was, in fact, existing; whether it was between employers and/or employees in the same industry, trade, craft, or occupation, or whether any such employees, including petitioners, had any direct or indirect interest therein. Irrespective of the argument hereinabove made that such a dispute cannot, now, be treated as a labor dispute under the new Labor Relations Act of 1947, it should be further emphasized that, assuming the factual existence of such a dispute, it was incidental to the main controversy between the parties herein concerning the $12.20 which petitioners claimed to be due to the producer of the bakery products. The case of *Converse* v. *Highway Construction Co.*, 107 F. 2d. 127 (C. C. A. 6, 1939) 127 A. L. R. 869, is quite analogous in this respect. To quote from that opinion: "In the case at Bar there was no real controversy between the debtor and its employees concerning terms and conditions of employment or concerning the association or rep-

resentation of persons in negotiating . . . terms or conditions of employment. . . . Wages and working conditions were incidental."

Prayer

Wherefore, respondent prays that the petition for a Writ of Certiorari to issue from this Honorable Court for the purpose of reviewing the judgment of the United States Court of Appeals for the District of Columbia, entered in this cause April 28, 1947, be denied.

WILLIAM E. LEAHY,
821 15th Street, N. W.,
Washington, D. C.;
IRVING WILNER,
315 Bond Building,
Washington, D. C.,
Counsel for Respondent.

FILE COPY

DEC 16 1947

No. 225

BRIEF OF RESPONDENT

IN THE

Supreme Court of the United States

October Term, 1947.

BAKERY SALES DRIVERS LOCAL UNION NO. 33,
An Unincorporated Association, and
CHARLES M. ANDRE, *Petitioners*,

v.

A. WAGSHAL, Trading as "Wagshal's Delicatessen,"
Respondent.

WM. E. LEAHY,
WM. J. HUGHES, JR.,
NICHOLAS J. CHASE,
Bowen Bldg.
821 15th St. N. W.
Washington, D. C.
Attorneys for Respondent.

WILSON - EPES PRINTING CO. - RE 6003 - WASHINGTON 1, D. C.

INDEX

	PAGE
Brief of Respondent	1
Questions Presented	1
Moribund Nature of Present Litigation	3
Outline of Argument	4
Statement of the Case	5
How Case Arose	5
The Facts	6
Affidavits of:	
Milton Blum	11
Jacob C. Leaman	11
Leon Terish	12
Benjamin Wagshal	12
Bernard H. Patton	12
Leo H. Freiburger	12
Argument	13
I. The Cause Involves Nothing More or Less Than an Ordinary Debt Action Normally Justiciable in the Small Claims Court of the Municipal Court for the District of Columbia	13
II. Analysis Shows the Mere Pretense of a Labor Dispute	14
III. There Never Was a Dispute About Any Subject Other Than the Collection of a Bill	16
IV. The Complaint as Filed by the Plaintiff and Construed by the Court Below Did Not Disclose a "Labor Dispute"	18

PAGE

V. There was No Need for Findings of Fact, the Pleadings Being Uncontroverted 21

VI. The Distinction Between No Labor Dispute at all and a Labor Dispute Without Merit 21

Conclusion 24

Exhibit A.

(Affidavit of Benjamin Wagshal) 25

TABLE OF CASES CITED

Brobst v. Brobst, 2 Wall 96 2

Brown v. McConnell, 124 U. S. 489 2

Columbia River Packers Ass'n. v. Hinton, 315 U. S. 143 15

Domestic and Foreign Commerce Corp. v. Littlejohn 22

Franklin tp. v. Tugwell, 66 App. D. C. 42, 63; 85 F. 2d 208, 209 23

Milk Wagon Drivers Union v. Lake Valley Farm Products, 311 U. S. 91 21

Retail Food Clerks v. Union Premier Stores, 308 U. S. 526 4

Toomey v. Toomey, 149 F. (2) 19, 80 U. S. App. D. C. 77 2

U. S. v. Hutcheson, 312 U. S. 219 21

U. S. v. Petrillo, this Court, No. 954, of 1946 4

U. S. v. United Mine Workers, 91 L. Ed. 595 ..... 5, 23, 18

STATUTES CITED

District of Columbia Code, 1940, Title 17-101 2

Norris-LaGuardia Act, 29 U. S. C. A. 110 2

Taft-Hartley Act (Public 101, 80th Cong.) 3

Rules of Civil Procedure, 73a 2

IN THE

Supreme Court of the United States

October Term, 1947

No. 225

BAKERY SALES DRIVERS LOCAL UNION No. 33,
An Unincorporated Association, and
CHARLES M. ANDRE, *Petitioners,*

v.

A. WAGSHAL, Trading as "Wagshal's Delicatessen,"
Respondent.

BRIEF OF RESPONDENT

QUESTION PRESENTED

Contrary to petitioners' statement in their "Statement of the Case", "Specification of Errors" and "Summary of Argument", the present Petition does not bring up for review the validity of the Trial Court's Order of Septem-

ber 7, 1945, denying Petitioners' Motion to Dismiss the Complaint. (R. 15) This is for the reason that the only basis for petitioners' appeal to the Court below is their claim to an appeal as of right under Section 10 of the Norris-LaGuardia Act (29 U. S. C. A. Section 110). But that section is limited to appeals from Orders granting or denying a temporary injunction in a case involving or growing out of a labor dispute, and does not include other interlocutory orders.

As appeals from the District Court to the Court below are limited to final judgments (Title 17-101, D. C. Code, 1940; *Toomey v. Toomey*, 149 F. (2) 19, 80 U. S. App. D. C. 77), in the absence of a special appeal from an interlocutory order (which was denied (R. 16) by the Court below) the only question for review by this Court is the validity of the Order granting a temporary injunction.[1] This Order has been in force since September 10, 1945—over two years. Under the Rules the case is entitled to be advanced for hearing but it is noticeable petitioners have made no effort to obtain a hearing and thus develop the full facts.

The sole question presented is therefore whether the trial Court had power to grant the Temporary Injunction without complying with the special requirements of the Norris-LaGuardia Act and this question reduces itself to

---

[1] Respondents filed a motion below to dismiss the appeal on the ground (a) the order overruling the Motion to Dismiss the Complaint was palpably non-final and hence non-appealable and (b) the order granting the temporary injunction was non-appealable, the Norris-LaGuardia Act being unapplicable. (R. 16) The Court below stated that "technically this cause is before us on an appeal from an Order of the District Court overruling appellant's motion to dismiss and an Order of the District Court granting an injunction pendente lite." (R. 19) However, the Court limited its opinion to whether the case involved a "labor dispute" within the meaning of the Norris-LaGuardia Act which question is pertinent solely to the matter of an appeal as of right from an Order granting a temporary injunction. (See LaGuardia Act, 29 U. S. C. A. 110) The Norris-LaGuardia Act gives no right of appeal from other interlocutory Orders such as an Order denying a Motion to Dismiss the Complaint.

whether the case involved a "labor dispute" within the meaning of that Act. (See Opinion below, R. 19)

Moribund Nature of Present Litigation:

The Yale Law School adopted the present case for academic discussion this year in its Moot Court. We suggest the case is of similar academic interest in this Court. The following facts appear:

(a) Hinkle's Bakery, the employer in the present case, went out of the wholesale business April 15, 1946. (See Appendix A)

(b) Union bakeries represented by petitioners'. Union are now delivering bread to respondent and have been since May 1947. (See Affidavit of Benjamin Wagshal, Appendix A.)

(c) The New Philadelphia Bakery, unionized, and New Yorker Bakery is paid by check in accordance with Respondent's practice at the time of the present dispute. In the case of the Continental Bakery, unionized, Respondent pays the driver. (See Appendix A)

(d) The Temporary Injunction was granted September 7, 1945, over two years ago.

(e) Petitioners' Special Appeal, General Appeal and Petition for Certiorari have delayed the trial on the merits from that date to this.

(f) The case is No. 1 on the Trial Calendar of the United States District Court for the District of Columbia, awaiting trial.

(g) Section 8 (b) (4) (A) of the Taft-Hartley Act (Public 101, 80th Congress) renders illegal the activities which the Injunction herein prohibits. It cannot be assumed the N. L. R. B. would not consider a complaint and move to restrain any resumption of the Union's illegal acts.

Only the injunction is involved on the present appeal. The above shows that no dispute now exists between the union and Respondent relative to (a) the time of delivery of bakery products; (b) method or practice of making collections for deliveries or (c) the sale of nonunion made items (see petitioner's brief page 3).

The mootness of the appeal from the injunction is shown by the fact that the employer is out of business and that members of petitioner's union are now making deliveries to Respondent. The injunction (R. 14) does not require; indeed, could not require this due to the 13th Amendment (See *U. S. v. Petrillo,* this Court, No. 954, of 1946, Appellees brief, point 3); cf. *Retail Food Clerks v. Union Premier Stores,* 308 U. S. 526).

OUTLINE OF ARGUMENT

Bearing in mind the present appeal involves only the injunction, the voluntary resumption of deliveries by the Union destroys any actual controversy, and makes the case moot.

But if not, the matter of hours of delivery was not a labor dispute. As the hour of delivery was inconvenient to the particular driver involved, the respondent ceased dealing with that particular bakery and took his trade to other Union bakeries, which now, using Union drivers, serve respondent. (Appendix A).

As to petitioners' second labor dispute (Pet. Brief p. 3, 9), the Union simply volunteered to collect by force a debt of $12.22 owed the employer, a matter which the Court below said should have been made the subject of a suit in the Small Claims Court. (R. 24) The claim that the money was owed the driver and not the bakery was obviously made to support the Union's demand for the money. (See R. 8, 9) Petitioners' counsel puff this up into a Union demand to change the method of doing business.

This, however, is simply argument of counsel. (Pet. Brief p. 9) The record contains no foundation for it. The only record references to it are at R. 2-3 and 9-10. What opposing counsel might, could, would or should have shown below, his various proffers of proof made to this Court in Petitioners' brief p. 8-9, are beside the point. But, once more, the Union is now serving Respondent; sometimes the driver collects and sometimes the Respondent pays direct. (Ex. A)

The third alleged labor dispute (Pet. brief p. 3, 10) offering for sale an alleged non-union product, resulted in its discontinuance. (R. 10) Also, the uncontradicted record shows that the Union agents order to respondent to get rid of the non-union item was made simply to enforce his demand for payment of the money. (R. 10)

The Court below did not, as petitioners contend, undertake to determine between a good labor dispute and a bad labor dispute; it simply held there was no labor dispute involved at all within the meaning of the LaGuardia Act. The Court had power to do this on the Complaint and Affidavits; it was an initial jurisdictional determination upon a Motion for Injunction to preserve the *status quo*. As in *U. S. v. United Mine Workers*, 91 L. Ed. 595, it was subject to change when the full facts were developed by Motion to Vacate, which Petitioners did not file, or by a hearing on the merits which Petitioners made no effort to obtain.

STATEMENT OF THE CASE

How Case Arose:

It is important to bear in mind that the present case was decided in the District Court on the basis of (a) The Complaint (R. 1); (b) Respondent's Motion for an In-

junction (R. 5); (c) Petitioner's Motion to Dismiss the Complaint on the ground the Norris-LaGuardia Act applied (R. 5, 6); Respondent's Answer to Petitioners' Motion to Dismiss, which Answer alleged that no "labor dispute" within the meaning of the Act was involved (R. 7); (d) Respondent's Affidavits supporting her Motion for a Temporary Injunction. The decision below arose on Respondent's Motion to Dismiss the appeal. (R. 16, 19)

Petitioners' Motion to dismiss filed in the District Court admits all facts well pleaded, no Answer having been filed. Also, as Petitioners filed no counter-affidavits the facts shown in Respondent's Affidavits must be taken to be true. They are in fact true. It is important to bear these facts in mind as Petitioners, on page 9 of its brief, proffer alleged facts and surmises outside the present Record which Petitioners could have but did not present to the Trial Court.

THE FACTS:

Petitioners having filed a Motion to Dismiss and adopted the sole and exclusive position in the Court below that the cause involved a "labor dispute," *the following facts were admitted to be true:*

Respondent has been for many years the owner of a delicatessen business located at 4855 Massachusetts Avenue, Northwest, Washington, District of Columbia. She sells at retail hundreds of kinds of foods, most of which are prepared and packaged by manufacturers throughout the United States and abroad. Among the foods sold are large quantities of bread, rolls, pastries and other bakery products "which are absolutely essential to the conduct of plaintiff's business." Shortly after filing the complaint in the Court Below, she had spent about $10,000 for modernization,

equipment and alterations in her store. The gross sales derived from the business totaled about $100,000 a year. R. 1)

On May 5, 1945, a bakery truck dr er, member of petitioners' Union, commenced delivering bakery products for Hinkle's Bakery. Respondent had been doing business with Hinkle's Bakery for several years prior thereto. On several occasions prior to July 5, 1945, the bakery truck driver had delivered bakery products to respondent during the busy noon hour and, accordingly, on July 5, 1945, Respondent required the said driver to bring said products back at a later hour. (R. 2) Shortly thereafter, Hinkle's Bakery advised Respondent that the driver would make no further deliveries to Respondent and that, therefore, Hinkle's bakery would not furnish Respondent with any more bakery products. Thereupon, Respondent arranged with another bakery (New Philadelphia) to secure bakery products and deliveries were made.

On July 26, 1945, the Petitioner, Charles M. Andre, appeared at Respondent's place of business, identified himself as the agent of the Union, and stated that $150 was owing to the bakery truck driver aforesaid by Respondent. He demanded immediate payment. Respondent stated that she had had no dealings with the driver and that the account was with Hinkle's Bakery; that previous payments had always been made directly to the Bakery by check and never to the driver; that Hinkle's would be paid in due course. Andre stated that payment would have to be made directly to the driver in full, and, further, that unless Respondent immediately discontinued selling a certain non-union made item, the Union would forthwith stop deliveries to Respondent of bread, bakery and dairy products, and other shipments from without the District of Columbia made by Railway Express. Andre stated that his Union was formed and maintained to enforce its de-

mands and were able to do so. Shortly thereafter payment of the account was made by Respondent as in the past, to Hinkle's Bakery, less certain credits. The payment was returned *by the Union,* with a letter signed by Andre, as president, stating that the payment "which is owed to our member, Leon Wolfe, cannot be accepted." (R. 2)

On July 27, 1945, the New Philadelphia Bakery which had been delivering products to respondent, sent word that no more deliveries could be made; that the Union had threatened to "pull out all its drivers if any products were sold or delivered to appellee." Thereupon, Respondent attempted to secure products from other bakeries and the Union threatened similar reprisals if products were sold or delivered to Respondent. A boycott was accordingly laid against Respondent. Respondent was not able to buy bread from bakeries. The Union also threatened to prohibit all deliveries and sales of milk and other dairy products. Respondent was not able to purchase bread at retail, retail stores having been threatened with reprisals if sales were made to Respondent. The union announced to various bakeries that "plaintiff was involved in a labor dispute," which statement was alleged to be false.

Respondent had, prior to the incidents herein recited, enjoyed a good reputation in the trade, yet Andre published false and malicious statements that Respondent owed money to the Hinkle Bakery truck driver and would not pay him. (R. 3)

Andre personally stood outside of Respondent's place of business and picketed the delicatessen. The picketing and boycotting herein described *continued* and as a result Respondent was unable to secure necessary food products, all of which illegal conduct would ultimately destroy Respondent's business.

Accordingly, the Court below was asked to restrain pendente lite and permanently the Petitioners from boy-

cotting and interfering with the business of Respondent, and, further, restrain Petitioners from publishing false statements with respect to Respondent's business. In addition to the injunctive relief, Respondent claimed actual damages in the amount of $50,000 and an equal amount as punitive damages. (R. 4)

We also set forth herewith a digest of the uncontroverted affidavits filed in support of the application for interlocutory relief:

Benjamin Wagshal

This affiant stated that the delicatessen had been operating for approximately nine years and in its present location approximately seven years; that he is the manager thereof; that it is a general delicatessen business and restaurant; that the business is retail in nature; that food is also served on the premises; that bread is an essential product in the conduct of the business; that business had been done with Hinkle's Bakery for approximately three years; that purchases of bread had been made directly from Hinkle's Bakery and payment therefor always made by check to Hinkle. (R. 8) that at no time theretofore had any question ever been raised by the Union or any of its drivers in regard to the direct payment to Hinkle for products purchased; that no demand for payment had ever been made at any time by the Union or any driver thereof prior to the instant controversy; that no contractual relations with the Union, or any of its drivers, had ever existed; that contract obligations were incurred with Hinkle and with no one else; that this was well known to the Union and to the driver; that the driver, Wolfe, had been advised that noontime deliveries of bread were extremely inconvenient and, accordingly, was asked to deliver the bread at some other hour; that the driver then refused to deliver bread at all; that respondent was indebted to Hinkle for bread already delivered "and in accordance with the said practice which had existed over the entire

period of time during which respondent had been buying bread from this bakery made her check payable to the owner of said bakery in the amount which she considered to be in full for all indebtedness then existing;" that Andre came to the delicatessen and stated that there was owing to the driver, Wolfe, approximately twelve dollars ($12.00) more than the amount forwarded to Hinkle by check; that by letter dated August 8, 1945, the check mailed to Hinkle was returned by Andre of the Union "because it is $12.22 short of the amount which is owed to our member, Leon Wolf." (R. 9)

Affiant further stated that no bread had ever been purchased from Wolfe and that all bread was ordered directly from the Hinkle Bakery.

Affiant further stated that prior to receiving the said letter, Andre orally advised affiant that the full amount would have to be paid and while doing so "pointed to a few packages of rolls" and advised him that he must get rid of them; that these rolls constituted but a small item of plaintiff's merchandise and, in comparison with the total amount purchased and sold by respondent, constituted an insignificant amount. The affiant further stated that as to this statement with regard to these rolls, Andre was making of them but an occasion for enforcing payment to Wolfe, the driver, a member of the Union.

Affiant then stated that Wagshal's had discontinued handling said rolls even though the same brand of rolls were on sale in many establishments in the City of Washington; further, that no question had ever been raised by the Union or any member (including Wolfe) thereof at any time theretofore in regard to their sale on the premises of respondent, even though the said Union had been delivering bread to Wagshal's from Hinkle's Bakery over a long period of time. (R. 10-11)

Affiant further stated that the Union caused all deliveries of bread to be stopped and threatened bakeries and

stores with reprisals if deliveries of any kind of merchandise were made to the respondent. (R. 11, 12)

Affiant concluded by stating that Wagshal's was willing and able to pay any indebtedness owing to the owner of Hinkle's Bakery; that at no time had there ever been a dispute with Hinkle; and "that the defendant Union is now attempting by its conduct hereinbefore described to compel the payment of a small item of $12.22 without determining the justice of the payment. . . ." (R. 12, 13)

Milton Blum

He stated that he was a partner and co-owner of the New Philadelphia Bakery located at 218-9th Street, Southeast; that commencing about July 7, 194., Wagshal ordered certain bakery products and deliveries were made; that payment therefor was made by check; that said deliveries averaged about 1,000 loaves of bread exclusive of rolls; that on July 25, 1945, Andre, agent of the Union, informed him that no further sales or deliveries of bakery products could be made to Wagshal for the reason that money was owed to a Union driver and that Wagshal refused to make payment. The affiant was told that unless sales to Wagshal were stopped, his bakery truck drivers would be "pulled out as the drivers refused to work for anyone who did not pay their bills." No further sales were made to Wagshal. (Unprinted Record, this Court)

Jacob C. Leaman

This affiant was employed by the Atlantic and Pacific Stores, located at 4855 Massachusetts Avenue, Northwest, adjacent to Wagshal's Delicatessen. He stated that an agent of the Union told him that no bread of any kind was to be sold to Wagshal and that even if as much as one loaf of bread was sold, no more bread would be delivered to said A. & P. Store. Accordingly, no further sales were made to Wagshal. (Unprinted record, this Court)

Leon Terish

This affiant stated that he operated a grocery store in Hyattsville, Maryland. He stated that he knew Benjamin Wagshal and, in order to assist him, had permitted purchases of bakery products to be made in his name; that an agent of the Union appeared at his store and told him that he was "not supposed to help Wagshal in any way to obtain bread, etc., from any of the bakeries and that we will have to watch you to make sure that you do not help Wagshal." (Unprinted record, this Court)

Benjamin Wagshal

This affiant filed a further supporting affidavit wherein he stated that every effort to secure bread was thwarted by the Union and that he was followed by an agent or agents of the Union in order to prevent him from obtaining bread and bakery products from any and all bakeries. (Unprinted record, this Court)

Bernard H. Patton

This affiant stated that he was the plant manager of Rice's Bakery. Although deliveries had been made over a long period of time to Wagshal, the driver for Rice's Bakery was directed by the Union to cease making deliveries to Wagshal "by reason of certain difficulties." The driver brought the bakery products back to Rice's. "Due to the said demand of said Union we have made no further deliveries to said store." (Unprinted record, this Court)

Leo H. Freiburger

This affiant stated that he was the owner of the Certified Bakery. He stated that he refused to sell or deliver bread to Wagshal for the reason that a Union official had informed him that Wagshal's Delicatessen was cut off from service by all Union bread salesmen because of a bill due and unpaid owing to one of the members of the said Union.

He also stated that selling bread to Wagshal at the bakery might be construed as a labor dispute and result in a work stoppage by the members of the Union at his bakery. "I therefore refused to sell the bread to Mr. Wagshal for the above mentioned reason. Furthermore, it is not the policy of this bakery to sell bread to anyone indebted to another bakery." (Unprinted record, this Court)

ARGUMENT

Point I.

The Cause Involves Nothing More or Less Than an Ordinary Debt Action Normally Justiciable in the Small Claims Court of the Municipal Court for the District of Columbia.

The only question before the Court is whether a controversy over the amount of an alleged debt constitutes a "labor dispute" within the meaning of the Norris-LaGuardia Act. Collaterally, there is involved the question as to whether the identity of the true creditor in a sale of merchandise can become the subject matter of a "labor dispute." A careful reading of the Record will disclose that any other controverted matters lurking in the pleadings and argument are just so much window dressing. No quarrel, controversy or dispute of any kind existed between the litigants until Andre maintained that Wagshal owed Wolfe, the truck driver, $12.22. When Wagshal refused to pay that sum, then boycotting, picketting, slander, libel, conspiracy, threats, reprisals and all that is considered the normal incidents of a true "labor dispute" followed . A cause normally the subject of a claim in the Small Claims Branch of the Municipal Court for the District of Columbia became according to the Union, a "labor dispute" and it was claimed the Court was without jurisdiction to stop any and all acts designed to compel Wagshal to pay the money to the truck driver. This, although

Wagshal had never had any contractual dealings whatsoever at any time with the Union or any member thereof.

Point II.

Analysis Shows the Mere Pretense of a Labor Dispute

Petitioners' brief is based on facts which do not appear in the pleadings either by direct averment or reasonable inference. In fact it proceeds upon presumption. Petitioners had the choice of filing an Answer to the Complaint and disclosing in that Answer the facts upon which they now rely by way of argument to make out a "labor dispute". They chose, however, to file a Motion to Dismiss. This Motion admits every fact well pleaded and every reasonable inference from the facts well pleaded. None of the ultimate facts in the Complaint spells out a "labor dispute" within the meanings of the Norris-LaGuardia Act. Petitioners' argument (Brief p. 8-10) amounts to the contention that every difference between labor and industry constitutes a "labor dispute". This is not and cannot be the law. If it were so then every specious or ill-tempered difference arising between a laborer and a businessman would constitute a "labor dispute" and give to the Union the right to exert all of its power, with no rights left in business to oppose it except in the circumstances covered by the LaGuardia Act (29 U. S. C. Sec. 107). Petitioners could have filed an Answer to the Motion for preliminary injunction, with affidavits, setting up therein those alleged facts which make out the "labor dispute" they try to read into the Complaint *now* in order to save the Motion to Dismiss. This they cannot do.

No court will hold that a mere dispute with a labor union is sufficient to oust the jurisdiction of a Federal District Court to grant an injunction where otherwise the facts warrant one and where no "labor dispute" within the meaning of the Norris-LaGuardia Act exists. In this case on the broadest theory conceivable the controversy

involved the amount of a bill owed to a third party (Hinkle) and its attempted collection.

Surely a dispute about an amount owed for bread to a third party cannot constitute a "labor dispute" where no relationship of employer and employee exists and where the purchase was made from the employer of the driver. As to Respondent the driver was acting in the capacity of a bill collector. The seller of the bread may have been glad to have him do so. He would thereby make it possible to obtain the amount he contends was due through the force of all the union activities. He cannot oust the Court of jurisdiction to determine the facts in controversy or deprive the purchaser of his right to his day in court. The driver who has volunteered cannot invoke the rights of union labor in his capacity as a volunteer bill collector. The relationship between the Bakery and the driver which is set forth in Petitioners' brief appears nowhere in the Complaint. Assuming it to be true, the driver then becomes an independent vendor and is within the ruling in *Columbia River Packers Ass'n v. Hinton*, 315 U. S. 143.

Neither is the dispute about the hour of delivery a "labor dispute". Respondent averred it as the occasion which caused the peevishness on the part of the driver. There is nothing in the record to show the Union picketed and boycotted because of the noon-hour dispute. There are six lines in the Complaint devoted to narrating this incident (R. 2) and not one word about it in the rest of the record. Petitioners' counsel might indulgently concede that Respondent's counsel, who are well aware of the existence of the LaGuardia Act, would not deliberately and unnecessarily plead an allegation capable of such a construction. A casual complaint about the inconvenience of deliveries at a particular time cannot be exaggerated into a dispute about hours, conditions of employment, wages, etc., which constitute the essentials of a "labor dispute" within the Norris-LaGuardia Act.

Petitioners then seize upon the allegation of "a certain non-union made item" (R. 2) identified in Wagshal's affidavits as rolls. (R. 10) But the same affidavit alleges the complaint about the rolls was but a pretext to enforce a threat relating to the bill. (R. 10) In any event Respondent promptly discontinued the item. (R. 10)

POINT III.

There Never Was a Dispute About Any Subject Other Than the Collection of a Bill.

A union truck driver tells a delicatessen owner that he cannot deliver bread at hours convenient to the delicatessen owner. The delicatessen owner, accordingly, is told by the bakery owner that the truck driver will no longer deliver any bread to the aforesaid delicatessen. (*There is no dispute or controversy of any kind at this point.*) (See at this point definitions of a "labor dispute", 29 U. S. C. 113 c) Shortly thereafter, a business agent of the Union called at the delicatessen and declared that the sum of $150.00 was owing to the truck driver and that this sum had to be paid immediately. The delicatessen disavowed any debt owing to the driver, saying the money was owed to the bakery owner, and this is when the *dispute begins.* The business agent said that payment must be had directly to the driver and, furthermore, the delicatessen was selling a "certain non-union made item" and unless this ceased (*and it did cease*), the delicatessen would be blocked from receiving bread, as well as all other food products, from all sources. The delicatessen owner, several days thereafter, sends a check to the bakery owner for a given amount in full settlement of the outstanding amount. Sometime shortly thereafter the labor union, of which the bakery truck driver is a member, returned the check by letter to the delicatessen owner, saying that the check is $12.12 less than what the bakery truck driver maintains the correct amount to be and that the money is owed to the bakery truck driver and not to the bakery owner.

The problem now is whether (a) the matter of who is entitled to the money, i. e., the bakery owner or the bakery truck driver constitutes a "labor dispute" and (b) whether the mechanics of collecting the debt per se constitute a "labor dispute."

Up to the time that the dispute arose as to who was the creditor, there had been no controversy as to any product, but the Union, by way of lifting itself by its own boot straps and to justify the "collection of a debt" (?) and wreckage of a business, and the invoking of sanctions which it conceived to be proper, proceeded to seize on this makeweight. Is that a "labor dispute"?

The question now becomes whether, at this stage, a "labor dispute" existed. Collaterally, this gives rise to the question as to whether or not a "labor dispute" must be a *good faith* labor dispute. We maintain that when the Union's agent pointed to the non-union product he did so in bad faith as alleged in the Complaint (R. 2) and admitted by the Motion to Dismiss, and that *at no time* did the question as to whether the delicatessen owner was carrying a non-union product ever constitute the subject matter of any controversy between the parties.

Petitioners now hope to cut off a full hearing on the merits. By filing a Motion to Dismiss and by proffering what might or could have been shown below (Petitioners' brief p. 8-9) they hoped to avoid a trial where these matters can be determined. If a labor union can by its own fiat label any fact situation wherein the Union is involved a "labor dispute" and then by the technique of a Motion to Dismiss avoid a hearing, a procedure will have been approved which hardly comports with due process. If this labor union bona fidely maintains that this case involves a "labor dispute", it should have no hesitancy in bringing the proof out in the open.

POINT IV.

The Complaint as Filed by the Plaintiff and Construed by the Court Below Did Not Disclose a "Labor Dispute."

We maintain the District Court had jurisdiction and power to order a temporary injunction *upon the Complaint as filed,* supported by the affidavits. Our Complaint proceeded upon the theory that there was no valid "labor dispute"; it was drafted to show upon its face that there was no such dispute.

The District Court possesses general jurisdiction to award injunctions. If any limitation upon that jurisdiction exists, it must be found in the Norris-LaGuardia Act. The Norris-LaGuardia Act deprives the District Court of jurisdiction to award injunctions in "labor disputes" unless in accordance with the terms of that Act. Therefore, if no labor dispute is disclosed upon the face of this Complaint, then the Norris-LaGuardia Act does not apply. Does the District Court not have jurisdiction, therefore, at least initially to examine and analyze the allegation of the Complaint to determine whether or not it discloses upon its face the existence of a valid "labor dispute"? Assuredly it has that jurisdiction. (Compare *United States of America v. United Mine Workers,* 91 L. Ed. 595, 613. If, therefore, the Court determines that no valid "labor dispute" exists, after analyzing the Complaint, then why does the Court still not retain jurisdiction to order an injunction? The District of Columbia Code gives the Court the power specifically to issue this injunction. The Complaint complied with the Rules of Court in the manner of its drafting. If there is no "labor dispute" shown, the Complaint is substantially sufficient and the Court had the jurisdiction to issue the order which it issued.

Petitioners argue that the Norris-LaGuardia Act is so broad both in its language and intent that the Court is deprived of all jurisdiction to issue injunctions against

labor unions once the petition discloses even by a prayer for relief that an injunction is sought; that from that point the Court must compel compliance with the Norris-LaGuardia Act. With this contention we disagree. We maintain what has been said heretofore, that no Court can read into the language or intent of the Norris-LaGuardia Act the broad purpose of Congress to strike from the jurisdiction of the District Court all right to issue injunctions for any reason against a labor union.

If we are sound in this, then this Court must determine whether the refusal upon the part of Wagshal to meet the demands of the Union driver to pay the bill to Hinkle in the full amount which he demanded constitutes a valid "labor dispute". As to this the Complaint discloses that Wagshal was in contractual relations with the Bakery Driver or Union at no time; that for several years Wagshal had been buying bread from Hinkle and paying Hinkle and that the relationship of vendor and vendee existed between these two; that the Union and the Bakery driver were strangers to that relationship; and that neither Hinkle nor the bakery driver could bring to bear upon Wagshal the full force of the strength of the Labor Union, with all the rights accorded to labor to enforce their demands, as a collection agency. If Hinkle asked the Union to collect the bill then the Union stepped aside from its character as a labor union and became a mere volunteer as said collection agency to aid Hinkle in obtaining his demands rather than have the claim determined by due process of law in the courts. If the Union contends that it was in contractual relations with Wagshal because of a side contract (of which we have no knowledge) between the Union and Hinkle to the effect that all moneys for bread sold on the route of the driver belonged to the driver and all liabilities therefor became the obligation of the driver, then the Union again stepped out of its character as a Union and becomes the vendor of the bread with the responsibility to make collections in accordance with law

for amounts owed for the sale thereof just as any other vendor or citizen. It cannot utilize those powers which the law has given the Union to enforce its demands for better wages and working conditions when in truth and in fact it is merely acting to collect a bill.

The Court must further decide whether the broad, general allegation of an objection to a certain non-union made item on the shelves of Wagshal constitutes the basis for a valid "labor dispute". This case was heard on a Motion to Dismiss. As said heretofore all the allegations of the Complaint are taken as true. In reply to the Motion to Dismiss and in support of the Motion for preliminary injunction, affidavits were submitted. Appellants now contend (Petitioners' brief p. 10, footnote) that the Court cannot refer to affidavits in the determination of the Motion because the Norris-LaGuardia Act specifically prohibits that reference. To determine the unity of the non-union made item it is necessary to refer to the affidavit of Benjamin Wagshal and if such reference is made, then the Court had the right to consider all of the affidavit. The transcript of the argument in the District Court will show that *Counsel for Petitioners* first imported the contents of the affidavits into the argument in the Court below. Therein it appears the item had been discontinued; (R. 10) that the dispute was mooted; (R. 10) that no legal ground existed further for the continuance of the conduct of the Union because of the item. Counsel must stand, therefore, or fall upon the affidavit if he refers to it at all. Here, again, there was no counter-affidavit filed denying the facts set forth in the affidavit. All Wagshal's affidavit did was to take out of the case a matter no longer pertinent. It was equivalent to amending the Complaint in the respect covered. There was no proffer by Petitioners of a traverse of Wagshal's oath that he had ceased dealing in the non-union goods.

POINT V.

There was No Need for Findings of Fact, the Pleadings Being Uncontroverted.

Petitioners in their Brief (p. 4, 7) speak of the failure of the Court below to make findings of fact. They rely on the Norris-LaGuardia Act (Sec. 9) but obviously the Norris-LaGuardia Act would not control unless a "labor dispute" existed. We say that this was a normal non-jury case wherein Rule 52 of the Federal Rules of Civil Procedure controlled if the facts were controverted. No evidence was taken. No Answer was filed. No counter-affidavits were filed. What facts could the Court find? All the facts were admitted by Petitioners. Certainly the Court was not required to pick and choose from ultimate and basic fact allegations in uncontroverted pleadings and affidavits. The only thing the Court below had to do was determine whether a "labor dispute" existed on the uncontroverted record. It found that none existed. That was the end of it.

POINT VI.

The Distinction Between No Labor Dispute at all and a Labor Dispute Without Merit.

Petitioners distort the Opinion below into holding that there was a labor dispute but it had no merit. (Petitioners' Brief, p. 12) They then proceed to slay this dragon with cases like *U. S. v. Hutcheson*, 312 U. S. 219; *Milk Wagon Drivers Union v. Lake Valley Farm Products*, 311 U. S. 91 and other cases (Petitioners' Brief p. 13-15) holding that Courts are not concerned with the morals of a labor dispute if in fact there is a dispute. But that is the whole point of the Opinion below. It did not hold there was a labor dispute without merit. The Court held there was no dispute in fact, but the mere show or pretense of a dispute. As the Court below said:

"The Courts have been most liberal in holding that wherever the facts show a bona fide labor controversy, *founded upon genuine issues involving the protection of labor in pursuing its legitimate objectives*, the Norris-LaGuardia Act is an effective bar to injunctive relief * * *. It does not follow from this that, where the facts do not support the assertion that there is in *fact* a dispute, the union should have the benefit of the doubt * * *" (R. 20, italics supplied)

What is this but saying that a Union agent's vindictive reprisal for failure to collect a $12.22 debt is not a *bona fide* labor dispute, i. e., not a labor dispute at all. Counsel for Petitioners are apt to forget that the phrase "labor dispute" means "labor dispute" as defined in the Norris-LaGuardia Act, Sec. 13 (29 U. S. C. A., Sec. 113). As the Court below said:

"To maintain that such gratuitous interference on the part of defendant Andre constitutes a "labor dispute" within the careful definitions of the Norris-LaGuardia Act is ridiculous." (R. 21)

This is not to descend into a discussion of the rights and wrongs of the alleged dispute, as Justice Edgerton's dissent states (R. 23). It is simply to hold that the Court will not permit a fraud on its jurisdiction; will not permit the pretense of a dispute, outside the Act, to be palmed off on it as within the Act.

The determination of the Court below that the Norris-LaGuardia Act did not apply and that it had jurisdiction to grant the Injunction was the ordinary intial determination of its jurisdiction by a Federal Court. It is analogous to a Federal Court determining, initially, that it had jurisdiction upon the claim of the existence of a Federal question or on diversity of citizenship or on removal. The Court's initial assumption of jurisdiction in such cases is always subject to change if in the trial of the case the facts show that no jurisdiction exists. In the case of *Domestic and Foreign Commerce Corporation v. Littlejohn* (unreported), decided by the United States Court of Ap-

peals for the District of Columbia, December 8, 1947, the Court adverted to this rule of practice in sustaining a suit against the War Assets Administrator, overruling a contention that it was a suit against the United States. The Court quoted with approval the following from *Franklin Tp. v. Tugwell*, 66 App. D. C. 42, 63; 85 F. 2d 208, 229:

> "Since a court must determine at the outset its jurisdiction to proceed, it is compelled to make a preliminary decision for jurisdictional purposes on the ultimate question in the suit, and this notwithstanding the fact that when the merits are heard, it may be compelled to reach an opposite conclusion. The courts solve this problem by accepting at their face value, for jurisdictional purposes, the assertions of the complainant of want of power in the officers—unless such assertions are 'so unsubstantial and frivolous as to afford no basis for jurisdiction. . . .', (citing Northern Pac. Ry. Co. v. North Dakota, 250 U. S. 135, 39 S. Ct. 502, 63 L. Ed. 897) and by giving the assertions thus accepted their natural jurisdictional consequences in respect of who are necessary parties."

Similarly in the present case the trial Court had power for purposes of a temporary injunction, and in the absence of a traverse by petitioners, to take the facts of the Complaint as alleged. If those facts showed no "labor dispute" was involved, the Court naturally had power to grant the injunction. The affidavits considered by the Court simply supported the allegations of the Complaint and there was no violation of the LaGuardia Act in their use. The action of the trial Court in the present case is very similar to that of the same Court (and the same Judge) in *United States v. United Mine Workers*, 91 L. Ed. 595, 613, 624, wherein this Court sustained the action of the trial Court in granting a temporary restraining Order to preserve the status quo. As said in the concurring opinion of Mr. Justice Frankfurter:

> "In the case before us, the District Court had power 'to preserve the existing conditions' in the discharge

> of 'its duty to permit argument and to take the time required for such consideration as it might need' to decide whether the controversy involved a labor dispute to which the Norris-LaGuardia Act applied." (91 L. Ed. 595, 624 at page 624)

In the present case the trial Court likewise granted a temporary injunction to preserve respondent's position in the expectation that the case would come on for early trial on the merits, a hope that was defeated by petitioners' action in pursuing successive appeals based on technical legal grounds. It comes with very poor grace from petitioners that they complain of the Court granting the temporary injunction on the Complaint and affidavits without hearing witnesses (Petitioners' brief, page 12), when petitioners deliberately refused to adopt a course (by traverse or counter-affidavits) which would have resulted in hearing witnesses.

CONCLUSION

The writ should be dismissed on the ground of mootness. If not, the judgment below should be affirmed.

Wm. E. Leahy,
Wm. J. Hughes, Jr.,
Nicholas J. Chase,

Bowen Bldg.
821 15th St. N. W.
Washington, D. C.

Attorneys for Respondent.

EXHIBIT A

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1947

No. 225

BAKERY SALES DRIVERS LOCAL UNION No. 33,
An Unincorporated Association, and
CHARLES M. ANDRE, *Petitioners*,

v.

A. WAGSHAL, Trading as "Wagshal's Delicatessen",
Respondent.

AFFIDAVIT OF BENJAMIN WAGSHAL

DISTRICT OF COLUMBIA, SS:

Benjamin Wagshal, being first duly sworn, deposes and says that he is the Manager of A. Wagshal, trading as Wagshal's Delicatessen, and has been for approximately eleven years.

The said Benjamin Wagshal, affiant herein, for further details and particulars as to his connection with the Delicatessen aforesaid and, more particularly, the dispute herein, respectfully refers this Honorable Court to the Affidavit which he filed in the United States District Court for the District of Columbia. (R. 8-13)

Affiant says that from the time the Preliminary Injunction was issued by the United States District Court on September 7, 1945, (R. 13-14) until the Decision in the

United States Court of Appeals for the District of Columbia on April 28, 1947, your affiant alone, and on occasions with a subordinate employee, secured necessary bread and kindred pastry products from various Union establishments in the District of Columbia. Your affiant was, however, required to provide his own transportation in procuring the said bakery products and, more particularly, was required to pick up the said bakery products at the bakery shops with his own automobile. Members of the Petitioners' Union herein, Bakery Sales Drivers Local No. 33, refused to deliver the said bakery products thus necessitating your affiant providing the transportation incident to securing the bakery products customarily used in the conduct of the businsss of the Respondent herein.

Your affiant further says, however, that on or about one week after the Decision of the United States Court of Appeals affirming the District Court, about May 10, 1947, a letter of instruction, signed by Charles M. Andre, Petitioner herein, was issued by the Bakery Sales Drivers Local Union, No. 33, Petitioner herein, addressed to the members of the aforesaid Labor Union, the same being the drivers of the bakery trucks delivering bread and bakery products from bakeries located in the District of Columbia having collective bargaining agreements with the aforesaid Local Union, stating that the said bakery drivers were now allowed to deliver bread and bakery products to Wargshal's Delicatessen, 4855 Massachusetts Avenue, N. W., Respondent herein.

Immediately upon the posting of the aforesaid letter of instruction by the Petitioner-Union, the drivers from many local bakeries called upon the store of the Respondent herein and offered their products for sale and delivery. Included among the drivers were those from the New Philadelphia Baking Company, Crusty Pie Company, Certified Bakery of the Continental Bakery Company, New Yorker Bakery Company, Ottenberg's Bakery, Bond Bak-

ing Company and other bakeries, the same all being bakery establishments employing Union bakery truck drivers exclusively. Your affiant at that time made purchases from New Yorker Bakery and Certified Bakery of the Continental Bakery Company and Crusty Pie Company and immediately thereafter began purchasing bread again from the New Philadelphia Baking Company. Currently, your affiant purchases from Crusty Pie Company, New Philadelphia Baking Company and Certified Bakery of the Continental Bakery Company. Deliveries have been made by the drivers of the aforesaid bakery establishments without interruption, peacefully and without dispute of any kind, from approximately May 10, 1947 to the time of these presents. At the present time the said deliveries are being made and there is no dispute whatsoever with the Union drivers of any of the bakery establishments aforesaid and from whom the Respondent herein makes purchases. Hinkle's Bakery went out of business April 15, 1946, and later reopened as a retailer only. The New Philadelphia Bakery is paid by check; the Continental Bakery is paid by paying the driver.

BENJAMIN WAGSHAL.

Subscribed and sworn to before me this 10th day of December, 1947.

EMILY V. MCKENZIE
Notary Public D. C.

R. 7.

SUPREME COURT OF THE UNITED STATES

No. 225.—October Term, 1947.

Bakery Sales Drivers Local Union No. 33, an Unincorporated Association, et al., Petitioners, v. A. Wagshal, trading as "Wagshal's Delicatessen."	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[March 15, 1948.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This is an action brought in a United States District Court to enjoin interference with a business, and the question is whether the complaint subjects that court to the limitations imposed by the Norris-LaGuardia Act upon its equity jurisdiction.

This is the substance of the complaint. Respondent owns a delicatessen store which sells food and serves meals. She obtained bread for the delicatessen store from Hinkle's bakery. Deliveries were made by a driver, an employee of Hinkle and a member of Local Union No. 33, one of the petitioners. The driver delivered the bread at noon, which inconvenienced the respondent, since the checking of deliveries at that hour interfered with the serving of lunches. Respondent "required" the driver to bring the bread at another hour. Shortly thereafter, Hinkle informed the respondent that it would no longer furnish her with bakery products. And so, respondent made arrangements with another bakery, which delivered at a more convenient hour.

Three weeks later, the petitioner Andre, president of the union, visited the delicatessen store and stated that the respondent owed the driver approximately $150 and

requested immediate payment. Respondent replied that she had never had dealings with the driver, but had paid Hinkle directly by check, and would pay the bill in due course. Andre replied that the payment would have to be made to the driver in full; furthermore, that if the respondent did not cease carrying a certain non-union article of food he noticed on display, delivery of bread, milk, and other products necessary to the respondent's business would be cut off. Shortly thereafter the respondent sent a check to Hinkle for the balance of her bill. It was returned by the union, with a letter signed by Andre asserting that the payment was owed to its member, the driver, and could not be accepted. The following day, the bakery which had been serving respondent after Hinkle had stopped doing so, ceased to deal with her, explaining that the union had threatened otherwise "to pull out all its drivers." Through an effective boycott, the union kept the respondent from obtaining bread from other bakeries or retail stores. The delicatessen store was also picketed.

The complaint prayed for temporary and permanent injunctions against the boycott and other interference with respondent's business, the payment of damages, and the usual catch-all relief. Petitioners moved to dismiss the action on the ground that the controversy as set forth in the complaint involved a "labor dispute" under the Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. §§ 101 *et seq.* Respondent filed an "answer to motion to dismiss," attached to which were affidavits, including one of Benjamin Wagshal, manager of the delicatessen store, elaborating the incidents narrated in the complaint. Among other matters set forth, he stated that payment for bread purchased from Hinkle had always been made by check sent directly to Hinkle and was never made to a driver, and that neither the union nor any of its drivers had ever previously questioned this practice; that Andre

had asserted by mail and at the delicatessen store that the check which the respondent had sent to Hinkle was $12.22 short of the amount owed; and that the non-union item on sale to which Andre had objected was not a subject of controversy but merely an excuse for Andre's attempt, on his visit to the delicatessen store, to enforce his demands concerning the bill, and that in any event its sale had been discontinued.

The District Court granted an injunction *pendente lite*, restraining the petitioners from interfering with respondent's business or preventing sale and delivery of bakery products to the respondent, by boycott and picketing. At the same time, it denied the petitioners' motion to dismiss. Petitioners filed a notice of appeal to the Court of Appeals for the District of Columbia, and respondents moved to dismiss the appeal.

If this case does not involve a "labor dispute" under the Norris-LaGuardia Act, an appeal as of right could not be had in the Court of Appeals for the District of Columbia. 31 Stat. 1189, 1225, as amended, D. C. Code (1940) § 17–101. However, § 10 of the Norris-LaGuardia Act, 47 Stat. 70, 72, 29 U. S. C. § 110, provides for immediate review of an order granting or denying "any temporary injunction in a case involving or growing out of a labor dispute . . . ."[1] The Court of Ap-

[1] Section 13 of the Norris-LaGuardia Act, 47 Stat. 70, 73, 29 U. S. C. § 113, reads as follows:

"Section 13. When used in this Act, and for the purposes of this Act—(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more

peals, one justice dissenting, held that this was not such a case, and dismissed the appeal. 161 F. 2d 380. Because of asserted conflict between this decision and prior decisions of this Court on the scope of "labor dispute" within the meaning of the Norris-LaGuardia Act, we granted certiorari. 332 U. S. —.

A preliminary claim must be met, that the case has become moot. The short answer to the argument that the Labor Management Relations Act of 1947, P. L. 101, 80th Cong., 1st Sess., § 10 (h), has removed the limitations of the Norris-LaGuardia Act upon the power to issue injunctions against what are known as secondary boycotts, is that the law has been changed only where an injunction is sought by the National Labor Relations Board, not where proceedings are instituted by a private

---

employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' (as hereinafter defined) of 'persons participating or interested' therein (as hereinafter defined).

"(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

"(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association, or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment; regardless of whether or not the disputants stand in the proximate relation of employer and employee.

"(d) The term 'court of the United States' means any court of the United States whose jurisdiction may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia."

party. The claim of mootness is also based on an affidavit stating that after dismissal of the appeal by the Court of Appeals, the union lifted its boycott. Since the record does not show that a stay of the injunction was granted pending action in this Court, we must assume that the union's action was merely obedience to the judgment now here for review. We therefore turn to the merits.

The petitioners attach significance to three incidents for their claim that a "labor dispute" is here involved.

1. The controversy over the hour of delivery. The petitioners claim that this was a dispute "concerning terms or conditions of [the driver's] employment," thereby raising a labor dispute, "whether or not the disputants stand in the proximate relation of employer and employee." § 13 (c) of the Norris-LaGuardia Act. But the respondent had nothing to do with the working conditions of Hinkle's employees, individually or collectively. Her only desire was to have the bread come at an hour suitable for her business, and she had no interest in what arrangements Hinkle made to satisfy that desire rather than run the risk of losing her trade—to have the bread delivered by the same driver at a different hour, or by another driver, by an independent contractor, or through some other resourceful contrivance. To hold that under such circumstances a failure of two businessmen to come to terms created a labor dispute merely because what one of them sought might have affected the work of a particular employee of the other, would be to turn almost every controversy between sellers and buyers over price, quantity, quality, delivery, payment, credit, or any other business transaction into a "labor dispute." Cf. *Columbia River Packers Assn.* v. *Hinton*, 315 U. S. 143. Furthermore, on the basis of what we have before us, respondent's disagreement with Hinkle over the delivery hour was a dead controversy, not in-

volved in the subsequent dispute with the union, or in the boycott against which the injunction was directed.

2. The controversy over the bill. The petitioners regard both the question whether payment was to be made to the driver rather than to Hinkle, and the disagreement over the disputed sum of $12.22, as a matter concerning the driver's wages, and therefore a condition of his employment. But, on the allegations now here, respondent had nothing to do with the payment of the driver's wages. The delicatessen store was Hinkle's customer. On the basis of the allegations to be considered, the driver would receive his pay whether or not respondent paid her bill. It is immaterial that the driver may have been the conduit for payment—as drivers who deliver packages normally are. The same is true as to the disputed item of $12.22. The mere fact that it is a labor union representative rather than a bill collector who, with or without the creditor's consent, seeks to obtain payment of an obligation, does not transmute a business controversy into a Norris-LaGuardia "labor dispute." Cf. *Dorchy* v. *Kansas*, 272 U. S. 306, 311.

3. The non-union item on sale in the delicatessen store. Sale by a merchant of non-union commodities is, no doubt, a traditional source of labor disputes within the scope of the Norris-LaGuardia Act. While the complaint itself did not indicate the history of this matter after Andre's visit, the affidavit attached to the "answer to the motion to dismiss" sets forth that it was not a bona fide bone of contention, but a mere pretext, and, further, that the respondent thereafter withdrew the item from sale. While the conclusion of the incident giving rise to a controversy may not necessarily terminate a labor dispute (cf. *Hunt* v. *Crumboch*, 325 U. S. 821), what is before us leaves no doubt that the subsequent boycott was addressed only to the question of payment of the bill. Petitioners suggest that since no injunction may issue in a case grow-

ing out of a labor dispute, except upon oral testimony, determination whether there is a labor dispute should not rest on affidavits. But in this case the affidavits were merely a gloss on the complaint and as such constituted an informal amendment. They serve here as allegations, not proof.

This case was decided on a motion to dismiss. All that was determined was that on the basis of the respondent's claims, which the petitioners chose not to controvert, the Norris-LaGuardia Act did not apply. Since the only issue before the court below, and therefore before us, was the appealability of the order for an injunction *pendente lite*, which in turn depended on the applicability of the Norris-LaGuardia Act, questions ~~on the merits~~ are not now open here.

Affirmed.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE MURPHY dissent. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this case.